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Supreme Court of the United States

JANUARY TERM, 1948

No. 17

JULIUS A. WOLF, PETITIONER,

vs.

THE PEOPLE OF THE STATE OF COLORADO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

PETITION FOR CERTIORARI FILED FEBRUARY 14, 1948.

CERTIORARI GRANTED APRIL 26, 1948.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 17

JULIUS A. WOLF, PETITIONER,

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THE PEOPLE OF THE STATE OF COLORADO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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[fol. 1] **IN THE SUPREME COURT OF COLORADO**

No. 15666

JULIUS A. WOLF and A. H. MONTGOMERY, Plaintiffs in Error,

vs.

THE PEOPLE OF THE STATE OF COLORADO, Defendants in Error

Error to the District Court of the City and County of Denver

Honorable William A. Black, Judge

Abstract of Record

INFORMATION

On May 18, 1944, information was filed charging Julius A. Wolf and A. H. Montgomery with the crime of conspiracy to perform an abortion upon one, Mildred Cairo.

PLEA OF NOT GUILTY

On July 10, 1944, defendants Wolf and Montgomery entered a plea of not guilty.

[fol. 2] MOTION FOR SEVERANCE

On June 2, 1944, defendant Montgomery filed a Motion for Severance, omitting formal parts as follows:

"At this day, comes the defendant A. H. Montgomery, by Henley A. Calvert, Esq., his attorney, and files herein his motion for severance which, omitting the formal parts and signature, is in words and figures as follows, to-wit:

"Comes now A. H. Montgomery and respectfully moves this Honorable Court to sever the information herein and to grant this defendant a separate trial and for grounds for this Motion shows unto the Court:

"1. That at the trial of this cause, there will be introduced evidence of matters that would be material and admissible as against this other defendant and would be inadmissible as against this defendant if

tried alone, and that such evidence, so admissible and material, as against the other defendant, does not relate to the reputation of such co-defendant.

"2. That to try this defendant jointly with the other defendant would greatly prejudice him in that such evidence affecting the other defendant but not affecting this defendant would be admissible, whereas if this [fol. 3] defendant is tried separately such evidence would not be admissible.

"This Motion is supported by the affidavit attached hereto."

Affidavit

'STATE OF COLORADO,
City and County of Denver, ss:

"A. H. Montgomery of lawful age, being first duly sworn according to law, deposes and says: That he is one of the above named defendants; That this defendant is informed and believes and so states the fact to be, that on the trial of this case evidence will be introduced by the State which would be admissible and material as against the co-defendant Julius A. Wolf and inadmissible as against this defendant if he were tried alone and separate from the other defendant, and that such evidence does not relate to the reputation of the other defendant.

"That a more particular statement of such evidence is, so this defendant is informed, substantially as follows:

"That after the arrest of this affiant and while he was in custody of Charles Foster, Sheriff of Arapahoe County, Colorado, at the time he arrested this affiant, stated to this affiant that Julius A. Wolf made incrimi- [fol. 4] natory statements involving himself and tending to show his complicity and participation in the offense alleged. That said statements were made by said co-defendant outside of the presence of this defendant and while said co-defendant was under arrest. That the evidence of such incriminatory statements would not be admissible and material as against this affiant, if tried separately, but would be as against said co-defendant.

"That this affiant is informed there will be other evidence which would be admissible as against his

co-defendant, and inadmissible as against him which does not relate to the reputation of the said codefendant, and this defendant cannot more definitely inform the Court as to the exact nature of said testimony.

"This affidavit is made in support of his Motion for a Severance as is required by Statute.

Signed—A. H. Montgomery.

Subscribed and sworn to before me this 12th day of May, 1944. My commission expires March 4, 1945. Richard Downing, Notary Public." (Seal)

[fol. 5] MOTION FOR SEVERANCE

On June 2, 1944, defendant Wolf filed a Motion for Severance, which is in substance the same as the Motion filed for Montgomery.

MOTION TO STRIKE MOTIONS FOR SEVERANCE

On June 10, 1944, District Attorney filed a Motion to strike Motions for Severance, on the ground that said Motions are vague, indefinite and a sham.

July 10, 1944, Motion of District Attorney to strike Motions for Severance for the defendants is denied.

STATEMENT OF DISTRICT ATTORNEY IN RE MOTIONS FOR SEVERANCE

On argument for Motion for Severance, the District Attorney made the following statement:

"In addition to that, I may state to the Court at this time that the People are not aware of any witness that can come into this court and testify at the trial of this cause that either of these defendants, Julius A. Wolf or A. H. Montgomery, at any time made any incriminatory statement involving the other which would be admissible as against one of them but not admissible against the other.

"Now, when I make that statement I want the Court to take into consideration that I am speaking from the evidence as I know it at this time. I have examined into the witnesses in this case that I have had anything to do with, and especially the witnesses named in their [fol. 6] affidavits as to these statements that were made

by the other defendants, and no such statements were made and there will be no testimony offered from either Charles Foster or Louis Malach. The other only witness endorsed is Franklin Thayer, and there will be no testimony offered from Franklin Thayer of any such nature.

"If the Court please, with that statement, the general proposition of law, as to the last paragraph of the affidavit, 'That there will be other evidence, this affiant is informed, which would be admissible as against his co-defendant, and inadmissible as against him which does not relate to the reputation of said codefendant, and this affiant cannot more definitely advise the Court as to the exact nature of said testimony,' the People are not prepared at this time to say and cannot say that there is no such evidence. We have no idea of what they refer to, and in the Kolkman Case, as the Court has stated, while that statement is not sufficient ground for a severance, if the record should disclose at the trial evidence was produced which was inadmissible and was erroneous, and it appeared from the bill of exceptions, then, of course, the case would be reversed; because the defendants have no way of determining what the evidence would be of what would be offered; if they are not foreclosed. [fol. 7] That, of course, is a general proposition of law which should be followed in this case as in any other case. Neither the Court nor the People at this time can state that there is any such evidence that would be admitted. The only statement that can be made by the People is that in this case they are not going to endeavor to mislead the Court or try to introduce any evidence that is inadmissible."

"The Court: I am telling you what the ruling is. You are not telling the Court. The ruling is that you may introduce any evidence which existed prior to the commission of the conspiracy, but after their arrest if there have been any statements made by either of the defendants concerning each other, they will be barred, based upon your statement. For that reason, for motions for severance will be denied."

MOTION FOR ORDER TO RETURN BOOKS AND RECORDS

On October 4, 1944, the defendant Wolf filed his motion for an order to return the defendant's books and records, omitting the formal parts, the motion is as follows:

"Comes now the above-named defendant, Julius A. Wolf, and respectfully petitions the Court to require the State acting through the District Attorney to return to this defendant certain books and records which were wrongfully seized by the District Attorney [fol. 8] from the office and in possession of the defendant. A more particular description of said books and records being as follows:

One 1943 Day Book

One 1944 Day Book

Said books were a necessary record kept by this defendant in the carrying on of his profession as a doctor of medicine, and which were a record of the names and addresses of the patients of this defendant who had come to his office in his professional capacity for treatment and cure, and also were a record of the ailments or diseases for which said patients came for treatment and other privileged matters.

"That said books and records were taken out of the custody of this defendant while in his possession by officers of the District Attorney's office forcibly and wrongfully without the consent of this defendant, and without any warrant or order of Court describing any place to be searched or thing to be seized, and that said search and seizures constituted an unreasonable search and seizure in violation of Article 2, Section 7 of the Constitution of the State of Colorado."

Motion duly verified by defendant Wolf. (This motion was argued, but ruling was reserved until the time of the trial as appears from the Record, Folio 108.)

[fol. 9]. **Statement of Trial Proceedings**

On December 4, 1944, case on for trial before a jury.

Mildred Cairo was sworn in as a witness and testified in substance as follows:

I was married to William Cairo on July 31, 1944. I was first married to him in 1938. I was divorced from him in October, 1943. I live at 749 Albion Street. I previously lived with my parents at 3858 Lafayette Street.

I saw Montgomery first at about 5 in the evening on April 3, 1944, at his home at 3106 West Ohio. I had called him on the 3rd at noon asking him if I could come out. He said yes, to be out about 5. So I went out. He let me in. I introduced myself and I told him I wanted an abortion. He asked me who sent me there. I gave him a fictitious name, so he told me it would cost quite a sum of money and they went according to months. But he asked me if I had been to a medical doctor. I said no. He said he wouldn't touch me until I had been examined by a medical doctor. He gave me Dr. Wolf's office in the Republic Building, and told me to be up there at noon Tuesday and he would arrange for Wolf to see me at noon Tuesday. So he asked me if my parents had known anything about this. I said no. He said, well, I would have to tell them because I would be in bed about a week. He didn't want them to get frightened if I should get sick and call in an outside doctor. He also stated that he lived outside of the City of Denver and he could perform an [fol. 10] abortion without complying with City laws.

At that time Montgomery made an appointment for me to see Wolf. He said that he was at 310 Republic Building, and that he lived at the Cosmopolitan Hotel. Montgomery told me that he never used instruments, he just used a drug.

I saw Dr. Wolf at his office. I walked in and I told him who I was. He says, yes, Montgomery called and told him I was coming. So he asked me how far pregnant I was. I says,

'Three months.' He says, 'Well, it will cost quite a sum of money.' He examined me. He gave me a vaginal examination. He says, yes, I was right; I was three months, and he said it would be $300.

Dr. Wolf wanted to know when I wanted it done. I told him as soon as possible. So he says he would arrange it. He told me to be at Dr. Montgomery's at 5 that same even-

ing and he would arrange everything with Montgomery. So I told him I would. He gave me his telephone number at the Cosmopolitan and his office phone number because, he says, I would need him within 24 hours after the abortion had been performed.

I went out to Dr. Montgomery's and he was waiting for me. He asked me how much money I had. I says I didn't have any. He told me that Wolf had told me to bring the [fol. 11] money out, which he hadn't. He says, well, he couldn't do a thing unless I had the money because he couldn't collect a thing on an illegal abortion after it had been done. So I told him I would have the money Thursday. He told me if I had the money Thursday to come out Thursday evening at 6.

I saw Dr. Montgomery on Thursday at 6. That was the time arranged between him and me. When I went in I told him I had the money. He took it. Then he gave me some pills. He said it would take about 20 minutes for the pills to take effect. He asked me if I had Dr. Wolf's telephone number, both where he was living and his office, and I said yes. He inserted a speculum and then inserted this drug and a syringe instrument and he packed me and told me to go right home go to bed; I would need Wolf within the next 24 hours.

Montgomery told me that if I ever sent anybody out to him to make sure who they were before I sent them. I asked him if I would have to pay the other doctor and he said no. I was at Dr. Montgomery's about 30 minutes. Then I went home and went to bed.

I saw Dr. Wolf Friday about 3 o'clock. I had been in bed all morning, I started getting pains, I had cramps and labor pains. My family called in Dr. Wolf. Dr. Wolf came to my home about 3 in the afternoon. He came in the bedroom and asked me how I felt. I said "Terrible." He said he had [fol. 12] arrived just in time. I miscarried and he helped me. He was pressing on my abdomen. He helped me as much as he could. Then he told me if I needed him again to call him.

I saw Dr. Wolf again on Saturday, the next day, at about 10 in the morning. He just stopped in and asked me how I was. I said, "Fine." He told me to come down to the office in about ten days for an examination.

I saw Dr. Wolf on April 21 at his office. He gave me

another examination and said I was all right. I asked him if I owed him any money. He said no.

Mr. Dickerson objects on behalf of Montgomery on the ground that if there was a conspiracy, then when the act was complete the conspiracy was complete.

Argument of counsel.

"The Court: The objection will be overruled as to this question about the money, it having been discussed by both the defendants prior to the time of the alleged abortion being committed. It seems to be too harsh a rule just to say 'leave it in the air' when it is done in the furtherance of the conspiracy, and the object of the abortion, so far as the defendants are concerned, to obtain the money, the $300—certainly, the situation, so far as the Court sees it now, is that any statements made by either of the defendants concerning the money [fol. 13] would be admissible."

Exception saved.

Wolf asked me if I had paid Montgomery. I said I had. He said that he would make out with Montgomery. I was out at Montgomery's house three times.

When I was in Wolf's office on April 4, I gave him my name.

Witness is shown book marked Exhibit "A". This is one of the books that the defendant, by Motion duly filed, sought to have returned to him on the ground that seizure constituted a violation of his constitutional rights.

"Q. Now, turning to a page in this book under date of Tuesday, April 4th, I will ask you to examine that and state whether or not your name appears there? A. Yes, sir. Q. How much of your name? A. It is "Mildred, 3858 Lafayette. Cherry 183—."

Mr. Dickerson objects because the book has not been introduced in evidence. Objection sustained.

Offer of Exhibit "A"

The District Attorney offers Exhibit "A" in evidence.

"Mr. Hornbein: We object, if your Honor please, to [fol. 14] offering the book in evidence. In the first place, we have not seen it. First they have to show us the book and have us look at it and then we can see whether it is objectionable or not. Then there will be another point raised, your Honor, in connection with the motion filed before the Court which the Court has still under consideration, being one of the books that was obtained in violation of the defendant's rights. Certainly, before he may offer it we have the right to look at it to see what it is and whether it is admissible.

"The Court: He has offered it now, and you gentlemen will have an opportunity to examine it."

Argument on objection.

After argument the Court ruled as follows:

"The Court: The Court feels that in view of objection being made to this evidence, you have a right to inquire into it the same as if it were a confession. For that reason the Court will hear the evidence pertaining to this book so that the record will show under what circumstances it was received.

"Mr. Anderson: If the Court please, we wish at this time to save our exceptions to your Honor's ruling that we are forced to go into this question of the admissibil- [fol. 15] ity of this evidence collaterally. I believe that this Court has erred in requiring that, and it being a tremendously vital part of this case, we would like at this time that your Honor enter an order recessing this trial until such time that we could submit that question to the Supreme Court and get a ruling upon it. We believe the Massantonio Case controls. We feel it of sufficient importance to do that.

"Mr. Dickerson: If your Honor please, it seems to me here and now is an effort to try to intimidate counsel and the Court—the question of submitting this to the Supreme Court, step by step by step by step. This question whether or not we have the right to show that they went out there and unlawfully, in violation not only of the law of searches and seizures but in violation of

the law that protects those patients who had come there, in violation of the rights of those people, laying sick and expecting visits on dates indicated, who could not have the benefit of their physician,—if this case is going to the Supreme Court, let us get the story in here and we will go to the Supreme Court, and the United States Supreme Court, indeed. This is that vital. But to start now to the Supreme Court, and recess, when the Supreme Court does not know what they did, we object to. Let us give them everything, and bring these [fol. 16] men here and cross-examine them and find out, and then let the Supreme Court pass on it.

"Mr. Anderson: Let me answer that, if your Honor please. The thing that we ask the Supreme Court to pass upon is not the question whether there is an unlawful or illegal search and seizure, but purely a question of the admissibility of the evidence. Counsel suggest that we proceed and take up certain matters later. But we are not unreasonable at this time. Counsel well knows if we proceed to a conclusion of this case at this time, with this type of evidence being excluded, the results of this trial may well be as he wishes it to be. We can appeal as a question of law, but the result of this trial will be forever settled. Therefore, at this time we ask your Honor that we be permitted to test that question.

Objection of District Attorney to going into the method of how the books were obtained, collaterally, was overruled.

The District Attorney then called Ray Humphreys as a witness in connection with the collateral inquiry as to how the books were obtained.

Ray Humphreys testified as follows:

I am Chief Investigator for the District Attorney's Office of Denver. On April 25, 1944, I had occasion to make an [fol. 17] investigation regarding the activities of a woman by the name of Gertrude Martin at the Cosmopolitan Hotel.

Objection was made by the defendant to the District Attorney's testimony concerning Gertrude Martin, but did not justify the search and seizure of the doctor's office.

Objection overruled.

Witness testified to a conversation with Gertrude Martin.

The gist of the conversation with Gertrude Martin at the

Cosmopolitan Hotel was that she had been aborted by Montgomery and had been to see Dr. Wolf before and after the abortion, or Dr. Wolf had been to see her after the abortion.

Conversation of Gertrude Martin caused defendants Wolf and Montgomery to be arrested.

"Q. Will you please state just what procedure was adopted in doing that and when? A. On the 27th of April, 1944, I instructed Mr. Malach and Mr. Thayer and Mr. Rice, yourself, to arrest Dr. Wolf. At the same time another deputy was instructed to cooperate with the sheriff in arresting Dr. Montgomery. As Dr. Montgomery was in Arapahoe County, outside of your district."

Witness identifies People's Exhibit "A", book in question.

[fol. 18] I saw it the first time on the evening of the day that Dr. Wolf was arrested. The book has been in my office ever since. I was requested by Mr. Shere to turn it over and the District Attorney requested me not to do so.

Cross-examination:

I obtained the book from Mr. Malach. He obtained it by taking it from Dr. Wolf's office. He had no search warrant or order of Court. I did not permit Mr. Shere, Dr. Wolf's attorney, to look at the book.

Cross-examination.

By Mr. Dickerson:

I ordered Mr. Malach to go to the doctor's office and obtain the records. Another book was taken at the same time. These books were taken incident to the arrest.

I gave Mr. Malach only the orders that all of us give incident to an arrest, to take whatever records are available. I did not order them to take all records, only records that showed the name of Florence or Gertrude Martin.

"Q. Did you instruct your deputy to go through all of the records in the doctor's office? A. I did not.

"You did not? A. (Nods in the negative.)

"A. How, then, would your deputy obtain the rec-

[fol. 19] ords that you desired if he didn't go through

them all? A. My deputy is trained, Mr. Dickerson. I don't need to tell him such a foolish thing as to search a whole office.

"Q. I believe you did say that you requested him to obtain all books where the name of Miss Cairo appeared. A. Oh, no."

I did not order my deputy to take any books where the name of Miss Cairo appeared.

FRANKLIN THAYER, witness on behalf of the People.

I am a deputy district attorney. I went with Mr. Malach to the office of Dr. Wolf. I saw the book marked Exhibit "A." It was in Dr. Wolf's office on the table in the office room. I picked it up at that time at the direction of Mr. Humphreys. I brought it to the West Side Court.

Cross-examination.

By Mr. Hornbein:

The book was in the consultation room. I do not know whether or not it was a private room. It was where he had his patients. I don't suppose a doctor's consultation room is public. The book was on the table in the consultation room.

I picked it up, looked at it and looked through it. I saw it was a current book.

[fol. 20] It was my conclusion that the book contained the names of patients and I took that book and another book. I had no search warrant or court order. We searched Wolf first.

I remember I had instructions to pick up any day books, so far as my instructions were, they were not limited to the case of Gertrude Martin. If I had definite instructions to find out where the name of Gertrude was in the book, I would probably have done so. I looked through the book to see if there were daily entries.

Cross-examination of Franklin Thayer:

I have been in the district attorney's office since April 1, 1944. I was admitted to the bar in Indiana in 1923; to the

bar in Colorado in 1926. Mr. Rice went to the building with us.

"Q. When you seized Exhibit A, were you acting on your own volition?

"Mr. Dickerson: I want to call your Honor's attentention to the Kelley Case and also the case of Erl Ellis, lawyers who attempted to do something along this same line, if your Honor please, in that connection. That is the reason I make this inquiry. It connects up directly, if your Honor please, with these other cases on searches and seizures, where a lawyer interested in a case or in obtaining evidence, plants microphones [fol. 21] to get evidence, or he takes down a door and takes out an article and gets information, as in connection with these other constitutional citations, your Honor, and that is the purpose of knowing whether one of the lawyers in the case participated by way of order to an inferior officer, also a lawyer; whether there was an agreement between the two. That is the purpose. I want to call your Honor's attention to those cases as I propose to cite them at a later time. It is material, your Honor. That is not the same type of inquiry we have before the Court now. Your Honor was interested solely in determining the manner and means by which this evidence now comes before this Court.

"The Court: Yes, the evidence in this case shows that the complaint was made to the District Attorney, concerning an abortion, and pursuant to that complaint or previous advice of it, an arrest was made. All I am concerned with is what he did."

I didn't say we went there for the purpose of arresting Dr. Wolf. I said we went there to arrest him under certain circumstances, and those circumstances transpired while we were in the building. At the time we arrested him we had instructions to pick up any evidence that might be pertinent to the case.

[fol. 22] "Q. So, therefore, you went there to get all of the evidence concerning that subject matter that you could get, didn't you? A. No, I wouldn't say 'all of the evidence.'

"Q. Were you going to leave some of the evidence there? A. Any evidence that we were permitted to

take and as pertinent to the case, we were to bring in.

"Q. By whose permission? Do you know? A. I beg pardon.

"Q. By whose permission do you mean, when you say 'any evidence that we were permitted to take.' Whose permission do you refer to? A. The law."

LOUIS MALACH.

My name is Louis Malach. I am investigator for the District Attorney's office. I am deputy sheriff. I went to Dr. Wolf's office to place him under arrest. We arrested him on the complaint of Miss Martin.

She made a complaint about Dr. Wolf and a man at 3106 West Ohio, I don't know the man's name.

At the time we went to Wolf's office we were looking for the record or any book containing the name of Gertrude Martin.

When I examined the book in the District Attorney's office [fol. 23] I found the name of "Martin." I made a further investigation of the book and found the name of Mildred Cairo. I found her name three times in Exhibit A. Her address and telephone number both appeared in Exhibit A. After finding the name of Mildred Cairo I had an occasion to see her and talk to her and I made an investigation as to whether Mildred Cairo had been aborted by either Wolf or Montgomery, and as a result of my investigation charges were filed against both doctors.

I did not have any warrant for the arrest of the defendant Wolf. We went there for the purpose of arresting him. We had information that felonies were committed there. Charges had not been filed. It was still in the process of investigation. We went there to arrest and investigate.

At the time of the arrest no information had been filed. Three of us went into Dr. Wolf's office. We went there to get records and to arrest Dr. Wolf.

Cross-examination of Mr. Malach:

When we went to Dr. Wolf's office we had no knowledge of Mildred Cairo. Never knew such a person existed. Went to Wolf's office to get his records and to arrest him. After we got to the District Attorney's office we looked through the record and looked up the names of the people in there. We found the name of Mildred Cairo. Then we contacted

[fol. 24] Mildred Cairo. We made an appointment to see her as a result of the knowledge which we obtained from the book. Then she came to our office and she told us all about it. Then we looked up names of other patients in this book. I don't know how many other names we looked up, possibly ten. We looked at every name in the book. Some names had an address, and some names a telephone number. We didn't know what these people were suffering from. We knew they were patients. They were women. We went out and contacted these people and went to find out for what purpose they went to Dr. Wolf. We didn't contact all of them. We only contacted those where there were prices stated. We contacted these people and made them come to the District Attorney's office. We didn't know what was the matter with them until they came. The only information we had so far as Miss Cairo was concerned came from the book. The same with all other cases, except Miss Martin's.

We got about ten or twelve women in altogether. The information was filed against Dr. Wolf on the information that the District Attorney had from the books.

Redirect examination of Mr. Malach:

Mr. Rice. All of the women we talked to whose names were found in Exhibit "A", told us that they had been either [fol. 25] aborted by Montgomery or someone else who was connected with Wolf.

I was incorrect when I said everyone we talked to had been aborted. I meant only two, from whom we had statements. It was a small percentage that denied having any abortion. There were only two women that I know of. One didn't talk at all.

"Q. Now, when these women came in, they came into your office and you asked them whether they had an abortion; is that how you approached them? A. No, we weren't quite that crude, no.

"Q. You wouldn't do anything like that? A. Not that crude, Mr. Hornbein.

"Q. Let's see how you proceeded. You said, 'Now, Mrs. So and So, you were in Dr. Wolf's office, weren't you?'

"A. That is about the substance of it.

"Mr. Hornbein: I know, but I want to see what he

said for the purpose of showing that the District Attorney's office called in women they didn't know anything about; they did not ask them about the commission of a crime; they asked what was the matter with them. I say that is not the right of any man in these United States, from the President down, to call a man or a woman in who has been a patient of a doctor, and [fol. 26] under color of law interrogate them as to what they went to the doctor for. That is exactly what he has done."

Recross-examination of Mr. Malach.

By Mr. Dickerson:

One of these women told us that Dr. Wolf would take care of them after they had been aborted.

Deposition of Gertrude Martin is offered. The deposition is limited strictly to the collateral inquiry.

Argument on objection to the admission of the book, and in support of the motion to return the book.

"Mr. Hornbein: Very well. Of course, your Honor, we are not going to reargue what we argued yesterday. There would be no sense in that at all. We argued the straight proposition, the constitutional proposition, that here there was an unlawful seizure and violation of the State Constitution. We do not claim that the Fourth Amendment to the Federal Constitution on Searches and Seizures applies to this State, but we do maintain that the amendment is a provision of the State Constitution which is substantially the same as the Federal Statute.

"Our argument is principally based upon the propo- [fol. 27] sition that there is an inherent difference between contraband articles that are unlawful to have, and mere evidentiary articles. Our argument is based upon the proposition that this which the District Attorney has done is absolutely contrary to the basic constitutional rights; that there is no Constitution of Colorado guaranteeing immunity from unreasonable searches and seizures if they are permitted to do this. The situation now is much more aggravated than it was yesterday. They admit they went down there on a general search, went down there for the purpose of taking these records and arresting them. That is what Mr.

Malach just said. They admit they had no information whatever as to the cause now before the Court. They went there and got that book from a doctor's office, a private doctor, looked at the book and found the patients, and went and checked those patients up to see what they had been suffering from.

"I say to this Court, in all seriousness, that is a proposition I do not believe will stand."

DEFENDANT'S MOTION TO QUASH AND FOR A DIRECTED VERDICT

Motion to quash the information and the jury is instructed to return a verdict of not guilty, for the reason that it affirmatively appears from the testimony which has been adduced on this collateral investigation that the information [fol. 28] which was filed is based wholly and altogether upon testimony and evidence that was obtained from the defendant in violation of the constitution of this state which provides that no person shall be compelled to give testimony against himself, and for the further reason that this action is based wholly upon the evidence which was obtained in violation of the constitutional law against unreasonable searches and seizures, the Fourth and Fifth Amendments to the Constitution of the United States.

Objection by Mr. Dickerson on behalf of Dr. Montgomery to the admission of the evidence or statements against Montgomery.

Continued argument of Mr. Dickerson and Mr. Calvert.

"The Court: This is the first time, I believe, that this question has ever been put squarely up to a trial judge. The only time, as a rule, it has ever been put up was where an indictment was brought by a grand jury. Ordinarily, where an indictment is brought in, it is shown in the motions filed at the proper time, setting up the matters and things which would constitute requiring the defendant to give incriminating testimony about himself, and the motion, in that case, should be quashed. The question here is whether or not, under our Criminal Code, this motion should not have been filed before the plea was entered.

[fol. 29] "Mr. Hornbein: We couldn't possibly know it at that time. It was not known until today. We do not know what testimony the District Attorney has, and did not know, until it was presented. But we know

it now after they testified. They brought it out themselves. We did not know it. Otherwise, we would have filed such motion."

Further argument of counsel.

MOTION TO QUASH OVERRULED

Opinion of the Court. Court overruled motion to quash, because motion was not in writing and that the reasons were not specifically set forth.

Next question is as to the admission of Exhibit A.

MOTION TO RETURN BOOKS AND RECORDS DENIED

"The Court: I might say, gentlemen, in order to keep the record straight, that motion to return the books and records was filed on October 4th. The Court, as you recall, stated he would take it up during the trial. In order that the ruling may be entered, the Court will now deny that motion."

An exception noted.

"The Court: Also in regard to Exhibit A, I think the ruling will be that it is admissible. While it has been properly before the Court, I do not believe it has been before the jury. In other words, I am ruling it is ad-
[fol. 30] missible if properly connected up."

Mildred Cairo resumes the stand.

Exhibit A is offered in evidence and exceptions noted.

My name appears written in this book, "Mildred. 3858 Lafayette. Cherry 1831." My name appears on Friday, April 7. On April 7 I saw Dr. Wolf at my home. My name appears on Saturday, April 8. My name appears again on April 21 when I saw Dr. Wolf at his office.

Cross-examination of Mildred Cairo.

By Mr. Dickerson:

I did say that I would have an abortion because I wasn't married at the time. My ex-husband was responsible for the pregnancy.

I remember testifying about William Schafer and his being arrested and placed in jail. He brought me medicine,

pills that were supposed to produce an abortion. I used the pills that were purchased by my boy friend. I did not know Wolf or Montgomery at that time. I made plans to bring about an abortion with William Schafer. I never talked to my ex-husband about my condition, but he was responsible for my pregnant condition. He knew it and wanted me to remarry him at the time. William Schafer bought the pills. I don't know where the money came from. [fol. 31] At that time my husband was trying to effect a reconciliation. I discussed the matter with William Schafer, but not with my ex-husband.

William Schafer took me to the office of Dr. Montgomery. I was out there on three different occasions. I got his address and telephone number from William Schafer.

I didn't know when Schafer was in jail. I never saw him after he was in jail. I paid Dr. Montgomery $300 and I got the money from William Schafer. I still say that William Schafer was not responsible for my condition. My ex-husband did not know that I was having an abortion procured.

I got the $300 from Schafer at my home.

"Q. All right. Do you remember making this statement? Do you remember this question being asked? 'Had you used any drugs on yourself at all? A. No, sir.' Do you remember that question and that answer?

"Mr. Rice: What page is that on, Mr. Dickerson?

"Mr. Dickerson: That is page 21 of my copy of the deposition, about half-way down on the page.

"Q. Do you remember that? A. No. I thought I said I did. I don't remember.

"Q. You don't remember saying that you didn't take any drugs? A. No, sir.

[fol. 32] "But you don't deny that you did say so? A. Well, I don't remember.

"Q. Well, do you remember after that making the admission that that statement was not correct? Do you remember that? A. (No response.)

"Q. When you were asked, on page 25, 'How many times did you take the drugs? A. Oh, twice, I think. Q. What's that? A. 'Twice.' Do you remember that? A. Yes, I think I do."

I saw Dr. Montgomery three times. Why did you say in this deposition that you saw him twice when you saw

him three times? I don't know. You see it here, don't you (indicating)?

The $300 I got from William Schafer was a gift from him. I was under no obligation to pay it back to him. My ex-husband did not know about that, he knew I was pregnant. I never discussed the matter with my ex-husband. I never told him I was destroying the child. My ex-husband knew I had miscarried the night of April 7. He was over there. He got mad about it and went out. He guessed that I had miscarried.

"Q. Well, you called on Bill Schafer to pay money for an illegal operation on the basis that he was responsible for your condition, didn't you. A. No, sir.

"Q. You didn't do that? A. I didn't ask him for money.

[fol. 33] "Q. So you say that you had had relations with him several months prior? A. Yes, sir.

"Q. And that he knew he couldn't possibly be responsible for your condition? A. Yes, sir.

"Q. But for some reason unknown to you, he anteed $300 for the illegal operation? A. Yes, sir.

"Q. Is that true, Mrs. Cairo? A. Yes, sir."

Dr. Montgomery never called Dr. Wolf in my presence. Dr. Montgomery gave me Dr. Wolf's name and telephone number. I wrote it down. I know of no reason why in my deposition I said I had only been to see Dr. Montgomery twice. I am positive I was there three times.

I don't know what kind of a job Bill Schafer has. I believe that he was waiting to be called for the service. I don't know his financial standing. I had known him about a year and a half.

He worked for Wm. Ainsworth & Son, he was a balance maker.

I threw the box that contained the pills in the stove. The first person I told of my pregnancy was William Schafer. I don't remember when I told him.

[fol. 34] I used the fictitious name of "Mary Brown" or "Mary Smith" when I went to see Dr. Montgomery.

Cross-examination of Mildred Cairo.

By Mr. Hornbein:

I don't know who it was that called Dr. Wolf to my home. I was in bed suffering from severe and serious pain. Dr. Wolf never used any instruments or drugs.

Dr. Wolf came to my home on Friday afternoon because of an urgent call that I was suffering great pain. I remember giving my deposition, it was last summer. William Schafer was in Court. He heard my deposition.

He was the party just described who gave me the money. I don't know why his deposition was not taken. It wasn't taken when mine was taken. I never saw Schafer after that. He knew all about this. He bought the drugs. I don't know where Schafer is.

Redirect examination of Mildred Cairo:

My deposition was given on June 21 of this year. On direct examination I testified that I had seen Dr. Montgomery three times.

I first met Bill Schafer when I started to work at William Ainsworth & Son. I informed him that I was pregnant [fol. 35] sometime in February. I did not request him to marry me. After I took the pills, I did not have any reaction to them at all.

Recross-examination of Mildred Cairo.

By Mr. Dickerson:

Louis Malach recalled and testified as to the book and that the book has been in the custody of the District Attorney ever since.

Cross-examination of Louis Malach:

I went to the office of Dr. Wolf for the purpose of getting additional evidence. I glanced in the book in his office, saw the book contained the names of many patients. The room in which the book was was the one off to one side of the reception room.

Ben Goorman:

Ben Goorman testified that he was the Undersheriff of Arapahoe County and arrested Montgomery on April 27,

1944. He was taken to the County Jail at Littleton and the next morning turned over to Ray Humphreys and Louis Malach.

FRANKLIN THAYER.

Franklin Thayer testified for the people as follows:

[fol. 36] His testimony was the same in substance as Louis Malach.

Exhibit A was shown to the jury and specific notations referred to by the witness were shown to the jury.

MOTIONS FOR DIRECTED VERDICT

Motion for a directed verdict on behalf of defendant Wolf.

Motion for a directed verdict on behalf of defendant Montgomery.

Argument overruled and exceptions saved, and thereupon defendants offered and gave the following evidence.

DR. EUGENE S. AUER.

Dr. Eugene S. Auer, witness for the defendants, testified to the good character of the defendant Wolf. That he is a member of the Medical Society, Colorado State Medical Society.

DR. A. H. MONTGOMERY:

Dr. A. H. Montgomery is called as a witness on his own behalf and testified as follows:

My name is Andrew Harrison Montgomery. I am a chiropractor and druggist. I am licensed as a chiropractor. I am 55 years of age. I have lived in Colorado since 1929. I live at 3106 West Ohio. I have never been convicted of any crime. Witness shows the certificate that he is duly licensed in his profession.

[fol. 37] I do not know the prosecutrix, Mildred Cairo, I saw her the first time in June, 1944, at the time the deposition was taken. She was never in my home in Arapahoe County. I never treated her for anything.

Cross-examination of Dr. Montgomery:

Witness testifies that he has a full-time occupation, more or less, with pharmacy.

Went to school in Chicago, and came here and worked for the Moler System Colleges. I never practiced medicine as a medical doctor.

My office was at 1457 Glenarin Place, and I live at 3166 West Ohio. I did not know Mildred Cairo before June of 1944. I have only known Dr. Wolf since I was in jail. I believe I was introduced to Dr. Wolf at the Legion Hall. I may have seen him, but I never had any business dealings with him. I have never had any conversation with him about medicine or chiropractic. I never participated in any business with him, or treated with him as a physician. I know Bill Schafer. I know his Uncle, Shimm, a barber. I went out and talked to him once after the case was filed. I think I was trying to locate Bill Schafer.

The only way I knew Bill Schafer was here in the Court room.

Do you know his Uncle, Mr. Schimm, the barber? I met Mr. Shimm, once I believe. I don't know what relation he is to Shimm.

[fol. 38] I believe that when I talked to counsel he told me to get hold of Schafer and see who he was. That was before the deposition was taken. I don't know where I got that name, or whether it was after the deposition was taken.

Mr. Dickerson's objection overruled.

I went up to the ranch to see William Schafer. I went up there on the advice of counsel.

Did you ask him at that time if he would talk to Mildred Cairo and see if she would exercise her constitutional privilege and not testify when the deposition was taken.

A. I don't recall anything of the kind. I do not remember whether it was the Sunday before the deposition was taken.

I believe the name Schafer came from Mrs. Ione Hale. I believe that it was some of the counsel that told me to go out and hunt that man.

I saw Ione Hale twice.

I did not know William Schafer before the time I was arrested in connection with this case. I rather think he is related to Mr. and Mrs. Shimm. My home telephone number is Race 2214. My office telephone number is Keystone 0088. Mrs. Cairo never called me on the phone.

[fol. 39] IZETTA MONTGOMERY,

Izetta Montgomery, witness on behalf of the defendant, testified as follows:

I am the wife of the defendant, A. H. Montgomery.

I do not know Mildred Cairo, never saw her before I saw her here in court. She never came to my home and was never admitted by me.

Cross-examination:

Never saw Mildred Cairo before I saw her in Court. Dr. Montgomery has patients come to the home in the evening. I did not know Dr. Wolf until this case opened.

DR. JULIUS A. WOLF.

Dr. Wolf testified that he has lived in Denver forty-three years. Graduated from the University of Colorado, Medical School. Took my Bachelor of Arts at the University of Denver. I took special courses in gynecology, obstetrics, female disease at Bellevue Hospital, New York, postgraduate. I was an instructor at the old medical school at 13th and Welton. I specialized and treated women's diseases, obstetrics, surgery, pelvic and abdominal surgery. I belong to the Denver County Medical Society, the American Medical Association, the Colorado State Medical Society. [fol. 40] There never have been any charges brought against me for unprofessional conduct.

Mrs. Cairo came to my office on the 4th or fifth of April. I took her name, address, and telephone number. She wanted to be examined for pregnancy. I examined her and found from the size of the uterus that she was about three months' pregnant. I did not know anything about her. I told her the fee would be $5.00. I didn't use any instruments or any drugs.

The next time I saw Mildred Cairo was on April 7 at her home. I received a call, went there, and found her in labor. She was miscarrying. I put my hand on her abdomen. She was in terrible pain. I found on examination that the head was through the canal. I told her within a few minutes she would miscarry and the pains would stop. I made an examination and found the head of the fetus was coming down the canal, that was the situation. When the fetus is in that position, it is impossible to restore it.

A child cannot be alive at three months, that is impossible. After the fetus is dislodged from the uterus, and it is not expelled, a woman is liable to have blood poison and other complications. That is because the fetus would disintegrate and the poison would go through the system. She might develop peritonitis.

I was there that day and sat in the parlor and talked [fol. 41] to her boy friend, Bill Schafer. I stayed to see that everything went along all right and that she didn't have a hemorrhage.

I saw the girl the next morning at her home, she was in fine condition. Said that she felt fine. I took her temperature to see that there was no infection. I told her to come in in about a week or ten days and that I would give her my personal check up.

I received $15 for my services.

Witness is handed the book which showed the entry of a payment. He was paid by Bill Schafer. The entry in the book was an entry of $15, which was a house visit. You discussed this case with Montgomery before you were arrested. I never saw Montgomery until I was arrested. I never conspired with him. I never aided or assisted Montgomery or any other person in procuring an abortion. I never used any drugs or inserted any instruments.

Cross-examination of Dr. Wolf:

I am on the staff of the Beth Israel Hospital. It has been about a year and a half since I have been on the staff of any other hospital in Denver. I was on the associate staff at St. Anthony's. I have just one office, and my office is in the Republic Building. I live at the Cosmopolitan Hotel, and have lived there about fifteen months. I live there with my brother. I remember when I first saw Mildred Cairo and when I made the notation in the book. [fol. 42]. The first time I saw her was when she came for the pregnancy test. I made no written record of the case. Sometimes I do not make a record. I do not make a history record at all times. It depends on what they claim. If it is a simple thing, I don't make a record. When Mildred Cairo came to me she did not make any mention of an abortion. She didn't say that she wanted my services during pregnancy.

I asked her a few questions as to her symptoms, and whether she had been sick to her stomach. That was about

all the history that I took. I don't have any recollection of her general health. I would say that her condition was a normal three months' pregnancy.

According to my book, Exhibit A, the first time I saw Mildred Cairo was on April 4, and the next time was on Friday, April 7, and on April 7 I called at her home. (The Record shows October 7 which is a typographical error.)

My usual house-call charge varies, sometimes $3 and sometimes $5; Office calls usually $2, depending on the amount of time, and for ordinary manual examinations I charge two or three dollars.

I talked to Bill Schafer. He asked me how much he owed me. I said, "I have been here quite a little time and have done quite a little work, I'll just run over tomorrow and make it $15 all together."

[fol. 43] "Q. Did you make this notation at that time, '150'? That means $15. A. '15' and there is a dot. You see the period after the '15'. Do you see the period?

"Where is the other '0'? A. I don't know. Sometimes I mark them down and put a '5' without putting any '0's'. Then I put a little line under it '15' and a line.

"Q. Sometimes you wrote '$15' '150' and other times '15 00' is that right? A. No. Just put one '5' or '0' or '15' or——

"Q. In this '150' means $15. A. There should probably be another '0' there. That book has been out of my hands eight or nine months.

"Q. There is only one '0' after the '5'? A. Yes, $15 and a dot, and a dash, like that (indicating).

"Q. Where is the dash like that? A. Right there (indicating).

"Q. Way down here? A. Yes. We make that '150' the same as those dashes like when you make out a check, put a little dash underneath the '0'.

"Q. Do you usually write '$15' just '150'? A. I probably was busy that day and just made the one '0'.

"Q. That could not by any chance be half of $300? A. No, it could not. There is a period after the '5.'"

[fol. 44] I did not send Mildred Cairo to the hospital on April 7 because there was no reason for sending her to one.

I do not send ordinary cases of miscarriage to the hospital.

"Q. What else? A. So I said, 'Well, let me examine you and see what is going on there.' I placed her on the bed. She also told me she was flowing. I forgot to mention that. She told me she was flowing and I says, 'Well, you probably are miscarrying then.' I placed her on the bed and put some newspapers under her to keep the bed from being soiled, and examined her and discovered the fetus was down in the bottom of the canal."

I did not question her as to how she got in that condition. I did not ask her what she had been doing, or whether she had tried to abort herself.

I understand that when you examine a perfectly normal woman and find that she is three months pregnant and normal in every respect, and two or three days later in a state of abortion, isn't that rather unusual?

It is rather unusual for a woman three months pregnant, a perfectly normal pregnancy, the pregnancy being normal, to abort just three days later. Such a situation does arouse suspicion.

[fol. 45] Did you make any inquiry as to what caused this abortion?

I may have asked her, but I do not remember what she said.

The case was filed shortly after I was brought to the District Attorney's office, and I have no recollection as to what I talked to Mildred Cairo about as to the cause of the abortion. I don't even believe I asked her because as I told you they tell all kinds of stories.

I did not report this still-birth to the State Board of Health as I am not required to do that. If there is a still-birth which means the baby breathes after five or six months then you have to report it. If they breathe you are supposed to report it.

I came back the next morning and examined her and she didn't have any infection. She said nothing about Montgomery at the time. I had met Montgomery once or twice, at several different clubs. We do not belong to the same professional societies. I never had anything to do with any chiropractor. I just knew one or two of them. I never sent

them any patients, and as far as I know never received any patients from them.

I saw Mildred Cairo again on the 21st. I made no additional charge. I don't believe that I had an additional conversation with her on the 21st, except that I asked her how she felt and she said fine.

[fol. 46] I kept the entries in the book. I make entries as people come in and I make these entries day by day.

On April 4, the only service I rendered Mildred Cairo was an examinaiton for pregnancy. Nothing was said about an abortion.

The occasion of taking her name, address and telephone number was so that I could send her a bill. You will find every one that has a name or number is also down twice. That is my personal record of my patients and my daily record, that is my record of all professional business. Nothing goes into this book except that which has to do with my business.

I had a speaking acquaintance with Dr. Montgomery. I never had any business with him, and I never sent him any patients, and he never sent me any that I know of. People's Exhibit C was marked for identification. I have seen that book before; it was my record for the year 1943.

This record in 1943 was kept in a similar way to the record of 1944.

I know where Dr. Montgomery lives, but I don't know his number. I might have seen it because I just happened to think that there was a maternity case about a year ago. I don't know whether I wrote it down or the girl in the office wrote it down, and said that Dr. Montgomery had sent this case up to me, and I had forgotten all about it. I said that I had never sent him a patient. I said that I didn't recall [fol. 47] whether he had ever sent any to me. I can't remember how many patients he sent me. I have no independent recollection of the name of the patient that he sent me that I delivered the baby. Would the name of the patient by any chance be Mrs. Allen? I don't remember a patient by the name of Allen. Witness is shown book. I wrote down the name of Mrs. Allen, but I have no recollection of that patient. Can you tell us what the word "Monty" means after that, in parentheses? To make a record of it, you wrote behind that name in parentheses "Monty". Dr. Montgomery may have sent Mrs. Allen in to see me. I

have no independent recollection at this time of any other patients by name that Dr. Montgomery sent me. I have no recollection of a patient by the name of Mrs. Bell.

Objection by counsel for defendant on the grounds that no doctor should be examined in regard to any communication with his patients.

Objection by Mr. Dickerson.

The Court: I understand the communications statute. You confine yourself to the examination on the acquaintance with Montgomery.

State offers in evidence Exhibit C.

Wolf's attention is called to an entry in the book showing the telephone number, RA 2214, 3106 W. Ohio, and the abbreviation "NT".

[fol. 48] Witness has no recollection of the meaning of that abbreviation. The telephone number RA 2214, and the address 3106 W. Ohio, is Dr. Montgomery's.

Witness's attention is called to an entry in Exhibit C being 3106 W. Ohio MG", also to an entry headed August 14, 1943, showing the name "McLaughlin". That is a patient's name and she was referred to me by Montgomery.

"Q. Doctor, in your system of handling these names that you entered into your book where they are sent by someone else you put the party that sends them in parenthesis?

"A. Usually, yes.

"Q. That is your own private system of doing things, isn't it?

"A. Yes, that's right.

Witness's attention is directed to *a* entry date August 24, 1943. The handwriting is mine. 3106 W. Ohio is Montgomery's address. That was a woman from Wray, Colorado, I had forgotten that she had been sent to me originally. She has been in a dozen times since.

There is another entry under date of September 11, 1943, which is called to the witness's attention showing the address of 3106 W. Ohio.

[fol. 49] There is an entry by the name of Mrs. Allen on February 5, in parenthesis "Monte". It is possible that "Monte" means "Montgomery." I have patients by the name of Montgomery, too, as you notice. There are several hundred names, and I can't remember all of them.

"Mr. Dickerson: We object to it. It is objectionable as far as we are concerned, and it is not proper evidence against Montgomery.

"Mr. Anderson: Now, at this time, your Honor, we will offer specifically the page referred to as February 5th in Exhibit A; February 11th in Exhibit A, and March 17th in Exhibit A; and the page that has May 13, 1943, in Exhibit C; June 3rd in Exhibit C; August 14th in Exhibit C; August 24th in Exhibit C; September 11th in Exhibit C."

Defendants interpose the original objections.
Court overrules objection and defendants except thereto.
Exhibits are shown to the jury.

Redirect examination of Dr. Wolf:

The witness's attention is directed to the entry in the book of Friday, April 7, indicating the first entry "Mildred [fol. 50] Cairo." There is no reference to Montgomery, or any reference to any telephone number, or any street number.

"Q. The District Attorney asked you if it was usual and customary when somebody sent you a patient to put in parentheses the name of the man sending the patient. A. I told him yes.

"Q. And that was so? A. That's right.

"Q. On this entry of 'Cairo' on April 7th, there is no such entry of Montgomery? A. Yes, and not on any other."

The witness looks at the book under date of April 4 which is the first time the name Mildred Cairo appears.

The name, address, or telephone number of Montgomery is not on that entry.

The name of Mildred Cairo appears on the 8th. There is an "H" next to her name that indicates house visit.

The last entry was on April 21. The name of Mildred Cairo appears there, but not the name or telephone number of Montgomery.

DR. EDWARD HARVEY:

Dr. Harvey, witness for the defendant, testifies to the good character of the defendant Wolf.

[fol. 51] Dr. Harvey also testified that it is not a practice to report miscarriages.

DR. HERMAN I. LAFF:

DR. Herman I. Laff, witness for the defendant, testifies to the good character of the defendant Wolf.

"Q. Do you know what his reputation is as a doctor in the medical profession?"

Question objected to by the State. Objection sustained. Exception by the defendants.

HARRY A. SULLIVAN:

Harry A. Sullivan testified to the good reputation of Dr. Wolf. His reputation is good.

EDWIN L. MCCULLOCH:

Edwin L. McCulloch, witness for the defendants, testified to the good reputation of Dr. A. H. Montgomery. He is a law-abiding citizen.

WILLIAM F. PRITTS:

William F. Pritts, witness for the defendants, testified to the good reputation, truth and veracity of Dr. A. H. Montgomery.

[fol. 52] SAM WILLIAM EMERSON and ROY P. WALLACE:

Witnesses for the defendants, testified to the good reputation of Dr. A. H. Montgomery.

Defendants rest.

RENEWAL OF MOTIONS FOR DIRECTED VERDICT

Defendants move for a directed verdict on the same grounds that it was made at the conclusion of the State's case.

Motion denied and exceptions saved.

INSTRUCTIONS REQUESTED BY DEFENDANTS

Instructions requested by the defendants, omitting the formal parts, are as follows:

No. 1

It appears from the evidence of the witness, Mildred Cairo that one William Schafer furnished her with the money to procure the alleged abortion, and that he accompanied her to the office or home of the defendant Montgomery.

Mr. William Schafer was a material witness in this case. If you believe from the evidence that he was available to the District Attorney, it was the duty of the District Attorney to call him as a witness, or to procure his deposition. And the failure of the District Attorney to do so justifies the inference that his testimony would not have been favorable to the State.

No. 2

The jury is instructed that the things which the defendant [fol. 53] Wolf actually did, namely, the examination of the prosecuting witness for pregnancy and attending her after an abortion had been committed, do not make him a co-conspirator with the defendant Montgomery, although he may have known at the time he examined the prosecuting witness that it was her purpose to procure an abortion, and although he may have known at the time he attended the prosecuting witness that she had committed an abortion.

No. 3

The jury is instructed that while it is not necessary that there be a formal agreement to constitute a conspiracy, yet it is necessary that there will be wilful, conscious, corrupt and active participation in carrying out and furthering a common criminal design. The mere fact that a defendant may have had knowledge that his alleged co-conspirator was

committing a crime and that a defendant acquiesced therein, is not sufficient to constitute a conspiracy.

No. 4

Where there is evidence that is material, available to and which can be produced by a party to any cause, and if such evidence is not produced, when available, an inference may be drawn that such evidence would be unfavorable to the party who fails to produce it.

[fol. 54] No. 5.

If you believe from the evidence that Mildred Cairo was pregnant, and if you further believe that she suffered a miscarriage, and that such miscarriage was brought about by any drugs or poison or liquids administered to her by some one other than one of the defendants in this case, or if you believe that such miscarriage was brought about by any other act on the part of anyone other than one of the defendants in this case, or if from the evidence upon this question you have a reasonable doubt as defined in these instructions, then your verdict should be not guilty.

The Court refused to give each of said instructions, to which refusal of the Court to give the tendered instructions, defendants duly excepted.

Instructions Given by the Court

Thereupon the Court instructed the jury as follows:

No. 1

Statement of the issues made by the information, and the pleas of not guilty.

No. 2

Stock instruction that information is a mere accusation.

No. 3

Statutory definition of a crime.

No. 4

Statutory definition of intent.

[fol. 55] No. 5

Instruction on presumption of innocence.

No. 6

Instruction on reasonable doubt.

No. 7

Burden of proof is on the People.

No. 8

Statutory definition of conspiracy.

No. 9

Statutory definition of an abortion.

No. 10

Instruction on venue.

No. 11

Instruction on conspiracy.

No. 12

The Court instructs the jury, as a matter of law, that all who take part in a conspiracy after it is formed, and while it is in execution, and who with knowledge of the facts concur in the plans originally formed, and aid in executing them, are fellow conspirators. They commit the offense when they become parties to the transaction, or further the original plan, with knowledge of the conspiracy.

[fol. 56] No. 13

The Court instructs the jury, as a matter of law, that to constitute the crime of conspiracy it is not necessary that the conspirators should succeed in their design; it is enough if the common design was formed, in manner and form as charged in the information. If the conspiracy charged in the information has been proven to the satisfaction of the jury, beyond a reasonable doubt, then the act of any one of the conspirators in furtherance of the common design, if proved, will be regarded as the act of the other.

No. 14

A common design and unlawful purpose by two or more persons is the essence of the charge of conspiracy, and this common design and unlawful purpose must be proved in order to warrant a conviction, either by direct evidence or by proof of such circumstances as naturally tend to prove it, and sufficient in themselves to satisfy the jury of the existence of such common design, beyond a reasonable doubt.

No. 15

The jury are instructed that one person cannot conspire by himself. In order to constitute a conspiracy, there must be active and conscious participation with a common design for the particular unlawful purpose alleged by at least two persons before the crime of conspiracy can be committed.

[fol. 57]

No. 16

There can be no conspiracy without at least two persons participating therein. If after a consideration of all the evidence in this case there is a reasonable doubt as to the guilt of either of the defendants, it is your duty not only to acquit the defendant concerning whose guilt there is a reasonable doubt, but also to acquit the other defendant.

No. 17

The jury is instructed that it is not incumbent upon the State to prove the alleged conspiracy by direct evidence. It may be established by circumstantial evidence or by evidence both direct and circumstantial.

In proving the agreement or conspiracy it is not necessary to prove the language in which it was made. The conspiracy may be shown, as stated above, by evidence more or less circumstantial in its character. It may be shown by what is said and done by each of the parties in the furtherance of the common design, if any acts are done, or by what system or concert of action between them appears from their acts when viewed as a whole.

In determining whether or not the defendants entered into a conspiracy to commit an unlawful act, to-wit: a felony, which felony was procuring an abortion by wilfully, knowingly, unlawfully and feloniously administering and [fol. 58] causing to be administered and taken, poisons and

noxious and destructive substances and liquids, and using and causing to be used instruments in and upon the body of one Mildred Cairo, the said Mildred Cairo being then and there a woman with child, with the intent then and there to procure the miscarriage of the said Mildred Cairo, you will consider, so far as shown by the evidence, all that was said and done by the defendants, whether or not they acted in concert for the accomplishment of a common purpose, what that common purpose was, if the same was shown, and from these facts and all the facts and circumstances shown by the evidence you must determine, beyond a reasonable doubt, whether the defendants entered into an agreement or conspiracy amongst themselves to commit the crime charged in the information.

No. 18

The jury is instructed that although you believe from the evidence that one of the defendants committed an abortion on the witness Mildred Cairo, that is not sufficient in itself to convict the defendants of conspiracy, unless you further believe from all the evidence, beyond a reasonable doubt, that said abortion was committed in pursuance and in the furtherance of and as a part of a conspiracy as hereinbefore defined.

And if the evidence does not so convince you, you must acquit both defendants.

[fol. 59]

No. 19

Instruction that if defendants unlawfully conspired and corroborated to perform an abortion upon Mildred Cairo, they were guilty of conspiracy, otherwise, they were not guilty.

No. 20

The Court instructs the jury that a duly licensed physician and surgeon may lawfully examine a patient for the purpose of ascertaining whether she is pregnant, and it is also lawful and right to attend her when in pain, when suffering from any cause whatsoever.

No. 21

Instruction on circumstantial evidence.

No. 22

Instruction on uncorroborated testimony must be corroborative.

No. 23

It is not necessary to prove that the offense was committed on the very date charged.

No. 24

Stock instruction on credibility of witnesses.

No. 25

Stock instruction on good character.

[fol. 60] No. 26

Stock instruction on punishment.

No. 27

General instruction that evidence stricken should not be considered, and arguments of counsel are not evidence.

EXCEPTIONS TO INSTRUCTIONS

The following exceptions were taken to the instructions. The defendant Wolf desires to object to the giving of Instruction No. 12 on the ground that it is not applicable to the issues under the evidence. In this case the sole conspiracy is a conspiracy between the two defendants, and the evidence does not develop any unknown person. While such an instruction may be proper in the case of an existing conspiracy, it is not proper here because there could not be any conspiracy under the indictment in the evidence. And further, the defendant objects because the instruction unduly emphasizes the Prosecution's theory of the case, and the Court has already instructed the jury that no formal agreement is necessary to be shown in order to constitute a conspiracy. The last sentence, of Instruction No. 12 is erroneous in that it makes one a conspirator who furthers the original plan with knowledge of the conspiracy. The law is that it is only an active, a conscious, a wilful and corrupt furtherance of the original plan which constitutes the conspiracy. It is the theory of the defendant Wolf that [fol. 61] what he did was lawful and within his rights as

a physician, and that he does not become a party to the conspiracy, even if he knew that his services were to be utilized by others to accomplish a wrongful purpose.

Objection overruled.

Exception.

The defendant Dr. Montgomery objects to the giving of Instruction No. 12 for the following reasons: First, that this instruction does not in any way apply to the existing case; second, that it is misleading in that it includes within its terms accessories before the fact, accessories after the fact and, in effect, makes any person having anything to do with a conspiracy or an unlawful conspiracy a conspirator himself, which is not, in fact, the law. In other words, under the terms of this instruction it is particularly harmful where abortion is the subject-matter under consideration, or conspiracy to perform an abortion is the subject-matter under consideration. If this construction were true, then any physician or surgeon or chiropractor or professional man or person who attempted to aid or assist a woman who was being aborted, or who had been aborted, even though he did so to save her life, in carrying out the terms of the conspiracy and helping her with the delivery which had been already started, or in otherwise aiding or assisting her in this matter after the conspiracy was complete, would be a conspirator. And this is not the law.

[fol. 62] The especially erroneous part of the instruction is the last phrase, "or further the original plan, with knowledge of the conspiracy." That would preclude a regular physician or surgeon or a hospital from taking care of a woman who had been aborted, or in saving a life as the result of his services.

Objection overruled. The Court has covered the matter in a previous instruction.

Save an exception.

Exception.

Defendant objects to No. 13, particularly the last sentence thereof, for the reason that it should also state, in fairness to the defendants, that if the conspiracy in the information has not been proven beyond a reasonable doubt, then what one of the defendants did is not to be considered against the other defendant. And also that this instruction emphasizes the prosecution's theory in giving various and sundry definitions and conceptions of conspiracy.

We have to object to Instruction No. 13 as being erroneous, because it would cover the acts and doings of an alleged conspirator after the completion of the alleged co-conspirator, and in view of the fact we filed a motion for severance here, this instruction given would be harmful for the reason that it would include evidence which was previously objected to and was objected to during the trial, [fol. 63] and that it does cover acts of a person not admissible as to the other defendant, where they were performed or said or done after the completion of the alleged conspiracy.

Objections overruled.

Exception.

We make the same objection to No. 14, that it unduly emphasizes the theory of the prosecution; that it is a restatement of the previous instruction with reference to conspiracy; that it is an incorrect statement of what a conspiracy is; that while the essence of a conspiracy may be a common design, and unlawful purpose must result from a definite, conscious, wilful co-operation between the alleged conspirators, which is not pointed out in this instruction. That under the evidence in this case the defendant Wolf did certain things, namely, examine the witness Cairo for pregnancy, and attended her, ministered to her when she was suffering; that under this instruction he and all others similarly situated, namely, physicians and surgeons, would be bound to forego a lawful activity merely because they might have known or even suspected that such activity was being utilized in the furtherance of an unlawful agreement.

Objection overruled.

Exception.

The defendant Dr. Montgomery objects to the giving of [fol. 64] Instruction No. 14 for the reason that it would contemplate any unlawful act not in itself an agreement, or not constituting a crime, and is therefore misleading; for the reason that it has no application and serves no purpose in this trial except to unduly point out and emphasize the State's theory and prejudice the defendant.

Objection overruled.

Exception.

We object to instruction No. 17 in its entirety for the reason that it is argumentative and has the nature of advocacy for the prosecution, specifically as to the first

paragraph, that is repetition of the statement made in instruction No. 14 to the effect that the conspiracy may be proved by direct or circumstantial evidence. The second paragraph of No. 14 is further repetitious of the same thought, and it descends into argument; the last paragraph of No. 17 is a further repetition of the same principle and is a comment on the evidence and invasion of the province of the jury in that it specifically points out to the jury the facts and circumstances that may be considered as tending to show the conspiracy, whereas, it completely ignores the facts and circumstances shown by the defendant which tend to prove the non-existence of a conspiracy. Further, that it authorizes and directs the jury to consider anything that was said or done by either of the defendants as against the other defendant regardless of whether or not said [fol. 65] defendants were acting in concert for the accomplishment of a common purpose, whereas the fundamental law is that the acts and statements of one defendant are only relevant against his co-defendant because of the existence of a concert and accomplishment of the common purpose; that a criminal agency or any agency can never be established by the declarations or conduct or statement of the agent until the criminal agency or partnership has been established.

Objection overruled.

Exception.

The defendant Dr. Montgomery objects to the giving of instruction No. 17 for the reasons that counsel already assigned, and for the further reasons that the argument purported to be given by this instruction in behalf of the prosecution is not warranted by the evidence; that it points out evidence or purported evidence which is not, in fact, in the case, or which has not, in fact, been admitted in the case, and applies it specifically to Mildred Cairo, and gives the jury to understand that Mildred Cairo was a woman with child, whereas, so far as the defendant Montgomery is concerned, he is not bound by such testimony and such a conclusion is not warranted in an instruction against the said Dr. Montgomery.

Objection overruled.

Exception.

[fol. 66] With Judge Calvert's suggestion, and I think it is a good one, there should be a general objection to this

instruction and the others dealing with conspiracy, that it is mere repetition and unduly emphasizes the State's theory of the case, and ignores the defendants' theory of the case.

Objection overruled.

Exception.

Save an exception.

VERDICT.

Verdict of the jury finding defendants guilty.

Exceptions to verdict.

Allowance of bail.

Order that defendant Wolf be allowed 20 days in which to file a motion for a new trial, bond fixed.

Formal entries of verdicts.

MOTION FOR NEW TRIAL.

Motion for a new trial by defendant, Julius A. Wolf, omitting the formal parts is as follows:

Comes now the defendant, Julius A. Wolf, and moves this Honorable Court for a new trial, and to set aside the verdict heretofore rendered, and as grounds for this Motion, shows unto the Court:

1. That the Court erred in overruling the Motion of the [fol. 67] defendant, Julius A. Wolf, to suppress as evidence certain books and records taken from the possession of the defendant, which records contained names of patients and the nature of their ailments, and other matters which were of a wholly private and confidential nature. Said books being Exhibits "A" and "C" in this case. For the reason that said books were taken without a search warrant or any other process of law, and in violation of the rights of this defendant under Article 2, Section 7 and Section 18 of the Constitution of the State of Colorado and the 4th Amendment of the Constitution of the United States.

2. The Court erred in overruling objections of the defendant, Julius A. Wolf to the introduction of said Exhibits "A" and "C" for the further reason that the admission in evidence of said Exhibits violated the statutes of the State of Colorado, which prohibit a doctor from testifying as to privileged communications received by him from his patients, which said statements were given to assist the

physician in his treatment and diagnosis and said Exhibits contained the ailments from which patients suffered and their introduction in evidence was, therefore, violative of the statute in such case made and provided.

3. The Court erred in overruling the objections of the defendant, Julius A. Wolf, to the introduction of said books and records, or either of them, on the ground that they were unlawfully obtained by the officers of the District [fol. 68] Attorney in violation of Article 2, Section 7, and Article 2, Section 18, of the Constitution of Colorado, and in violation of the 4th Amendment to the Constitution of the United States.

4. The Court erred in overruling the Motion of the defendant, Julius A. Wolf, made orally during the course of the trial to quash the information for the reason that it affirmatively appeared from the testimony of the State that the information was based wholly upon evidence which was obtained from the books and records of the defendants, which were unlawfully and wrongfully seized in violation of Article 2, Section 7, and Article 2, Section 18, of the Constitution of Colorado, and in violation of the 4th Amendment to the Constitution of the United States, whereby the defendant was compelled to give testimony against himself, which testimony was the sole basis of the information, all in violation of Article 2, Section 18, of the Constitution of Colorado.

5. The Court erred in overruling the Motion of the defendant, Julius A. Wolf, made at the conclusion of the State's case for a directed verdict of "not guilty" for the reason that the evidence affirmatively showed that the defendant did nothing except that which was lawful for him to do in accordance with the practice of his profession, and that the evidence was wholly insufficient to establish any conspiracy to which the defendant was a party, and the [fol. 69] Court further erred in overruling the Motion of the defendant, Julius A. Wolf, made at the conclusion of all the testimony for a directed verdict of "not guilty" for the same reason.

6. The Court erred in refusing to give defendants' tendered instruction No. 1, in which the Jury was advised that one William Schafer was a material witness, and that it

was the duty of the District Attorney to call him as a witness or procure his deposition if he was not available.

7. The Court erred in refusing to give defendants' tendered instruction No. 2 in which the Court was requested to charge that the things that the defendant did, do not make him a conspirator, and that the refusal to give said instruction was erroneous because it correctly stated the law, and the defendant was entitled to have his theory of the case presented to the Jury.

8. The Court erred in refusing to give defendants' tendered instruction No. 3, in which the Jury was sought to be instructed that it was necessary that there will be willful, conscious, corrupt and active participation to make one a conspirator, the necessary elements of active and corrupt participation were not stated.

9. The Court erred in refusing to give defendants' tendered instruction No. 4.

[fol. 70] 10. The Court erred in refusing to give defendants' tendered instruction No. 5.

11. The Court erred in giving instruction No. 12, for the reason that said instruction was not applicable to the issues involved in this case, in that there are only two persons to the alleged conspiracy, and that such instruction is only proper when it appears that a conspiracy has actually been formed, and that thereafter one enters into said conspiracy in furtherance thereof.

12. The Court erred in giving instruction No. 13 for the reason that it unduly emphasizes the theory of the State's case and ignores the defendant's theory.

13. The Court erred in giving instruction No. 14 for the reason that it is a repetition of matters already covered in the instructions and it unduly emphasizes the theory of the State's case and ignores the defendant's theory.

14. The Court erred in giving instruction No. 17, for the reason that it is a repetition of matters already covered in the instructions and it unduly emphasizes the theory of the State's case and is argumentative and is in the nature of advocacy, and the same is misleading and ambiguous.

15. The Court erred in denying defendant's Motion for a Severance in that the Court admitted testimony that was

[fol. 71] admissible as against the other defendant, but was not admissible against this defendant if tried alone and did not relate to the reputation of such co-defendant.

16. That to the refusal to give said tendered instructions, the defendant Julius A. Wolf, duly saved his exceptions and further saved his exceptions to the instructions herein challenged, to which his objections were overruled.

17. Further, the verdict of the Jury is against the law and the evidence, and the evidence is insufficient, to sustain any verdict or judgment save and except a verdict of "not guilty."

(Orig. Sgd.) Philip Hornbein, Donald M. Shere, Attorneys for Defendant, Julius A. Wolf, 620 Symes Building, Denver, Colorado.

MOTION FOR NEW TRIAL

Motion for New Trial filed by A. H. Montgomery, which is the same in substance as the Motion for New Trial filed by Julius A. Wolf.

DENIAL OF MOTIONS FOR NEW TRIAL

Separate exceptions of the defendant.

SENTENCE

Sentence of the Court that each of the defendants serve not less than one year nor more than 18 months.

Exception to sentence.

[fol. 72] COURT ORDERS

Stay of execution of 60 days and 60 days for a bill of exceptions is granted.

Formal entry of order denying Motion for New Trial.

Formal entry of sentence of Julius A. Wolf.

Formal entry of sentence of A. H. Montgomery.

Formal entry of order staying execution.

Additional time for stay of execution.

Deposition of Gertrude Martin attached to the Record.

Additional time for preparation of Bill of Exceptions.

July 16, 1945, additional time for stay of execution.

Certificate of trial judge signed August 3, 1945.

Certificate of clerk signed and filed July 24, 1945.
Certificate of trial judge dated August 3, 1945.

ASSIGNMENTS OF ERROR OF JULIUS A. WOLF

Assignment of Error, omitting formal parts, is as follows:

Comes now Julius A. Wolf, the above-named plaintiff in error and respectfully represents to this Honorable Court [fol. 73] that at the trial and proceedings in the Court below there was manifest and material error to the prejudice of the plaintiff in error, a specification of said errors being as follows:

1. That the Court erred in overruling the Motion of the defendant, Julius A. Wolf, to suppress as evidence certain books and records taken from the possession of the defendant, which records contained names of patients and the nature of their ailments, and other matters which were of a wholly private and confidential nature. Said books being Exhibits A and C in this case. For the reason that said books were taken without a search warrant or any other process of law, and in violation of the rights of the defendant under Article 2, Section 7 and Section 18 of the Constitution of the State of Colorado and the 4th Amendment of the Constitution of the United States.

2. The Court erred in overruling the objections of the defendant, Julius A. Wolf, to the introduction of said Exhibits A and C for the further reason that the admission in evidence of said Exhibits violated the statutes of the State of Colorado, which prohibit a doctor from testifying as to privileged communications received by him from his patients, which said statements were given to assist the physician in his treatment and diagnosis and said Exhibits contained the ailments from which patients suffered and their introduction in evidence was, therefore, violative of the statute in such case made and provided.

3. The Court erred in overruling the objections of the defendant, Julius A. Wolf, to the introduction of said books [fol. 74] and records, or either of them, on the ground that they were unlawfully obtained by the officers of the District Attorney in violation of Article 2, Section 7, and Article 2, Section 18 of the Constitution of Colorado, and in violation of the 4th Amendment to the Constitution of the United States.

4. The Court erred in overruling the Motion of the defendant, Julius A. Wolf, made orally during the course of the trial to quash the information for the reason that it affirmatively appeared from the testimony of the State that the information was based wholly upon evidence which was obtained from the books and records of the defendant, which were unlawfully and wrongfully seized in violation of Article 2, Section 7, and Article 2, Section 18, of the Constitution of Colorado, and in violation of the 4th amendment to the Constitution of the United States, whereby the defendant was compelled to give testimony against himself, which testimony was the sole basis of the information, all in violation of article 2, Section 18 of the Constitution of Colorado.

5. The Court erred in overruling the Motion of the defendant, Julius A. Wolf, made at the conclusion of the State's case for a directed verdict of "not guilty" for the reason that the evidence affirmatively showed that the defendant did nothing except that which was lawful for him to do in accordance with the practice of his profession, and that the evidence was wholly insufficient to establish any conspiracy to which the defendant was a party, and the Court further erred in overruling the Motion of the defendant, Julius A. Wolf, made at the conclusion of all the testi- [fol. 75] mony for a directed verdict of "not guilty" for the same reason.

6. The Court erred in refusing to give defendants' tendered instruction No. 1, in which the Jury was advised that one William Schafer was a material witness, and that it was the duty of the District Attorney to call him as a witness or procure his deposition if he was not available.

7. The Court erred in refusing to give defendants' tendered instruction No. 2 in which the Court was requested to charge that the things that the defendant did, do not make him a conspirator, and that the refusal to give said instruction was erroneous because it correctly stated the law, and the defendant was entitled to have his theory of the case presented to the Jury.

8. The Court erred in refusing to give defendants' tendered instruction No. 3 in which the Jury was sought to be instructed that it was necessary that there be willful, conscious, corrupt and active participation to make one a

conspirator, the necessary elements of active and corrupt participation were not stated.

9. The Court erred in refusing to give defendants' tendered instruction No. 4.

10. The Court erred in refusing to give defendants' tendered instruction No. 5.

11. The Court erred in giving instruction No. 12 for the reason that said instruction was not applicable to the issues involved in this case, in that there are only two persons to the alleged conspiracy, and that such instruction is only [fol. 76] proper when it appears that a conspiracy has actually been formed, and that thereafter one enters into said conspiracy in furtherance thereof.

12. The Court erred in giving instruction No. 13, for the reason that it unduly emphasizes the theory of the State's case and ignores the defendant's theory.

13. The Court erred in giving instruction No. 14 for the reason that it is a repetition of matters already covered in the instructions and it unduly emphasizes the theory of the State's case and ignores the defendant's theory.

14. The Court erred in giving instruction No. 17 for the reason that it is a repetition of matters already covered in the instructions and it unduly emphasizes the theory of the State's case, and is argumentative and is in the nature of advocacy, the same is misleading and ambiguous.

15. The Court erred in denying defendant's Motion for a Severance in that the Court admitted testimony that was admissible as against the other defendant, but was not admissible against this defendant if tried alone and did not relate to the reputation of such co-defendant.

16. That to the refusal to give said tendered instructions, the defendant Julius A. Wolf, duly saved his exceptions and further saved his exceptions to the instructions herein challenged, to which his objections were overruled.

17. Further, the verdict of the Jury is against the law [fol. 77] and the evidence, and the evidence is insufficient to sustain any verdict or judgment save and except a verdict of "not guilty."

(Signed) Philip Hornbein, Donald M. Shere, Attorneys for Julius A. Wolf, Plaintiff in Error.

Assignment of Error of A. H. Montgomery

Assignment of Error, omitting the formal parts, is as follows:

Comes now A. H. Montgomery, the Plaintiff in Error, and respectfully represents to the Court that there were manifest grievous and prejudicial errors committed by the District Court of the City and County of Denver, and State of Colorado, in the proceedings, trial and judgment rendered and entered in the above entitled cause in the following particulars, to-wit:

1. The Court erred in overruling the objection of the defendant, A. H. Montgomery, to the admission of any testimony that occurred after the alleged illegal act for which the conspiracy was formed and completed, and for the further reason that at the overruling of the Motion for a Severance; the Court instructed the District Attorney that it would not permit introduction of any evidence that would be admissible against one defendant, but not admissible against the other if tried alone.

2. The Court erred in overruling the objection of the de-[fol. 78] fendant, A. H. Montgomery, in permitting Exhibit "A" to be introduced in evidence for the same reason as stated in Paragraph 1.

3. The Court erred in overruling the Motion of the defendant, A. H. Montgomery, made orally during the course of the trial to quash the information for the reason that it affirmatively appeared from the testimony of the State that the information was based wholly upon evidence which was obtained from the books and records of the other defendant, which was unlawfully and wrongfully seized in violation of Article 2, Section 7, and Article 2, Section 18, of the Constitution of Colorado, and in violation of the 4th Amendment to the Constitution of the United States, whereby the other defendant was compelled to give testimony against himself, which testimony was the sole basis of the information, all in violation of Article 2, Section 18, of the Constitution of Colorado.

4. The Court erred in overruling the Motion of the defendant, A. H. Montgomery, made at the conclusion of the State's case for a directed verdict of "not guilty" for the reason that the evidence affirmatively showed that the de-

fendant did nothing except that which was lawful for him to do in accordance with the practice of his profession, and that the evidence was wholly insufficient to establish any conspiracy to which the defendant was a party, and the Court further erred in overruling the Motion of the defendant, A. H. Montgomery, made at the conclusion of all the testimony for a directed verdict of "not guilty" for the same reason.

[fol. 79] 5. The Court erred in refusing to give defendants' tendered instruction No. 1 in which the Jury was advised that one William Schafer was a material witness, and that it was the duty of the District Attorney to call him as a witness or procure his deposition if he was not available.

6. The Court erred in refusing to give defendants' tendered instruction No. 2 in which the Court was requested to charge that the things that the defendant did do not make him a conspirator, and that the refusal to give said instruction was erroneous because it correctly stated the law, and the defendant was entitled to have his theory of the case presented to the Jury.

7. The Court erred in refusing to give defendant's tendered instruction No. 3 in which the Jury was sought to be instructed that it was necessary that there be willful, conscious, corrupt and active participation to make one a conspirator, the necessary elements of active and corrupt participation were not stated.

8. The Court erred in refusing to give defendants' tendered instruction No. 4.

9. The Court erred in refusing to give defendants' tendered instruction No. 5.

10. The Court erred in giving instruction No. 12 for the reason that said instruction was not applicable to the issues involved in this case, in that there are only two persons to the alleged conspiracy, and that such instruction is only proper when it appears that a conspiracy has actually been formed, and that thereafter one enters into said conspiracy [fol. 80] in furtherance thereof.

11. The Court erred in giving instruction No. 13 for the reason that it unduly emphasizes the theory of the State's case and ignores the defendant's theory.

12. The Court erred in giving instruction No. 14 for the reason that it is a repetition of matters already covered in the instructions and it unduly emphasizes the theory of the State's case and ignores the defendants' theory.

13. The Court erred in giving instruction No. 17 for the reason that it is a repetition of matters already covered in the instructions and it unduly emphasizes the theory of the State's case and is argumentative and is in the nature of advocacy, and the same is misleading and ambiguous.

14. The Court erred in denying defendants' Motion for Severance in that the Court admitted testimony that was admissible as against the other defendant, but was not admissible against this defendant if tried alone and did not relate to the reputation of such co-defendant.

15. That to the refusal to give said tendered instructions, the defendant, A. H. Montgomery, duly saved his exceptions and further saved his exceptions to the instructions herein challenged, to which his objections were overruled.

[fols. 81-82] 16. The verdict of the Jury is against the law and the evidence, and the evidence is insufficient to sustain any verdict or judgment save and except a verdict of "not guilty."

(Signed) F. E. Dickerson, William F. Dwyer, Attorneys for Plaintiff in Error, A. H. Montgomery. Respectfully submitted, Philip Hornbein, Donald M. Shere, F. E. Dickerson, William F. Dwyer, Attorneys for Plaintiffs in Error, Symes Building, Denver, Colorado.

[fol. 83] IN SUPREME COURT OF COLORADO

MOTION FOR LEAVE TO FILE SUPPLEMENTAL ASSIGNMENT OF ERROR—Filed February 18, 1947

Comes now the plaintiff in error, Julius A. Wolf, defendant below, and moves this Honorable Court to grant a leave to file a supplemental assignment of error as follows:

1. That the Court erred in overruling the Motion of the defendant, Julius A. Wolf, to suppress as evidence certain books and records taken from the possession of the defend-

ant, which records contained names of patients and the nature of their ailments, and other matters which were of a wholly private and confidential nature. Said books being Exhibits A and C in this case. For the reason that said books and records were taken by the District Attorney of the City and County of Denver, a State Officer functioning under the authority of the State of Colorado, without a search warrant or any other process of law, and in violation of the rights of the defendant under the due process clause of the Fourteenth Amendment of the Constitution of the United States, and the defendant specifically invokes the protection of the Fourteenth Amendment against said unlawful search and seizure.

Philip Hornbein, Donald M. Shere, Attorneys for Plaintiff in Error, Julius A. Wolf, 620 Symes Building, Denver, Colorado—TA. 5174.

IN SUPREME COURT OF COLORADO

ORDER DENYING MOTION FOR LEAVE TO FILE SUPPLEMENTAL ASSIGNMENT OF ERROR—February 27, 1947.

Upon consideration of the motion of the plaintiffs in error, asking leave to file supplemental assignments of error herein, the Court being well advised, doth deny said motion.

[fol. 84] IN SUPREME COURT OF COLORADO

JUDGMENT—November 3, 1947

This cause having been brought to this Court by writ of error to review the judgment of the District Court of the City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the Court upon the matters assigned as constituting error in the proceedings and judgment of said District Court, and it now appearing to the Court that there is no error in the proceedings and judgment of said District Court.

It is therefore ordered and adjudged that the judgment of said District Court be, and the same is hereby, affirmed.

and that it stand in full force and effect; and that this case be remanded to said District Court for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said District Court in the cause, notwithstanding the said writ of error.

In Supreme Court of Colorado

No. 15666

Julius A. Wolf and A. H. Montgomery, Plaintiffs in Error,

v.

The People of the State of Colorado, Defendant in Error,

Error to the District Court of the City and County of Denver

Hon. William A. Black, Judge

En Banc. Judgment Affirmed

Mr. Philip Hornbein, Mr. Donald M. Shere, For Julius A. Wolf,

Mr. F. E. Dickerson, Mr. William F. Dwyer, For A. H. Montgomery, Attorneys for Plaintiffs in Error.

Hon. H. Lawrence Hinkley, Attorney General; Mr. Duke W. Dunbar, Deputy Attorney General; Mr. James S. Henderson, Assistant Attorney General, Attorneys for Defendant in Error.

Opinion

[fol. 85] Mr. Chief Justice Burke Delivered the Opinion of the Court:

Plaintiffs in error, hereinafter referred to by name, were convicted of conspiracy to commit abortion and each was sentenced to the penitentiary for a term of one year to eighteen months. To review that judgment they prosecute this writ. They were represented below and here by separate counsel. Wolf assigns 17 errors and Montgomery 16. Generally they are duplications and separate consideration is unnecessary. Some require no examination and others

are so interrelated it is useless to take them up separately. Those deserving of notice may properly be thus classified and considered: 1—The seizure and introduction in evidence of Exhibits A and C; 2—The overruling of motions for severance; 3—The giving and refusal of certain instructions. Even these are so related that the disposition of one will leave little to be said as to the other. All motions and objections necessary to save the points were presented and overruled.

Wolf was a regularly admitted and practicing physician and surgeon whose professional activity consisted principally in the treatment of diseases of women, obstetrics, and pelvic and abdominal surgery. Montgomery was a duly licensed chiropractor. The particular offense charged concerned an abortion on one Mildred Cairo. Representatives of the district attorney's office, having no information concerning that offense, but possessed of definite information concerning a similar one committed on another woman and the connection of Wolf and Montgomery therewith, went to the office of Wolf without a warrant and took him into custody and there they took possession of said Exhibits which were his day books of 1933 and '34 up to the time of the arrest. They were records of patients who consulted him professionally. So far as Mildred Cairo was concerned they disclosed only her name, address and telephone number.

1—It is contended that the seizure and use of these Exhibits constituted reversible error. First, because it violated the fourth paragraph of Section 9, chapter 177, C. S. A. '35, which provides that the physician "shall not, without the consent of his patient, be examined as to any informa- [fol. 86] tion acquired in attending the patient which was necessary to enable him to prescribe or act for the patient; * * *". There are two answers to this contention. First, the information contained in the Exhibits was not "necessary to enable him to prescribe or act for the patient," and second, this act is solely for the protection of the patient, not the physician.

> Hanlon vs. Woodhous, 113 Colo. 504, 508; 160 Pac. (2d) 998. 28 R. C. L. sec. 132, p. 542.

Mildred Cairo testified in this cause, was fully cognizant of all the proceedings and had every opportunity to object to any disclosures made concerning her. Since no intima-

tion to the contrary came from her lips throughout the trial her consent must be assumed for the purpose of this case.

The second objection is that the seizure and introduction of Exhibits A and C was in violation of Section 7, Article II of the constitution which forbids unreasonable search and seizure and forbids any such search and seizure without a warrant, and Section 18 of Article II, id., which provides "that no person shall be compelled to testify against himself in a criminal case. This identical contention was before this court over twenty years ago and decided to the contrary. The opinion was by the court en banc, one Justice not participating, all the others concurring.

Massantonio v. People, 77 Colo. 392; 236 Pac. 1019.

Numerous cases on both sides of the controversy were there cited. That decision has never been disturbed through the years, but has been frequently followed and reaffirmed.

Roberts v. People, 78 Colo. 555; 243 Pac. 544;
Bills v. People, 143 Colo. 326; 157 Pac. (2d) 139.

Among the decisions of sister states handed down since the disposition of the Massantonio case, and following it, might be mentioned.

State v. Dillon, 34 N. M. 366; 281 Pac. 474;
State v. Frye, 58 Ariz. 409; 120 Pac. (2d) 793;
People v. Onofrio, 65 Cal. App. (2d) 585; 151 Pac. (2d) 158.

[fol. 87] The question would thus seem to be definitely and finally disposed of in this jurisdiction under the rule of stare decises. We are not unconscious of the fact that that rule is frequently ignored, with the general approval of the courts, for certain definite and often valid reasons. Among these are doubtful decisions handed down by closely divided courts and recent decisions establishing rules not yet firmly embedded in the jurisprudence of the jurisdiction. No such reason can possibly exist here. The best reason, and the one perhaps most frequently invoked to justify a departure from the rule, is that the case under consideration by the court demonstrates that adherence thereto will either promote injustice or defeat justice. No such reason exists in the instant case for any present change in the rule. The result of any present revocation or modification would here defeat justice and promote injustice. The evidence over-

whelmingly supports the conclusion of the jury that these men were guilty; that this was not the only instance of their guilt but that they had been generally engaged in such forbidden practice. Their scheme appears to have been, and so the jury doubtless concluded, that persons familiar with their operations would steer prospective victims to Montgomery, who required that they first consult Wolf and get his opinion as to pregnancy, etc., and arrange for him to attend them after the operation. They then returned to Montgomery who did the actual work and turned the patient back to Wolf. One or the other fixed the fee and they divided it.

If a case ever comes before us which demonstrates that the rule in the Massantonio case has worked injustice, or prevented justice, it will be time enough to consider alteration or modification of that rule. Certainly these parties are in no position to contend that the law of Colorado which has stood for twenty years and been affirmed and reaffirmed by this tribunal and the decisions of sister states, should now be overturned or so modified that they may escape the toils in which their own felonious conduct has involved them.

It seems superfluous to add that nothing here or heretofore said by us and nothing contained in any of the numer- [fol. 88] ous decisions of other jurisdictions in support of the rule in the Massantonio case, justifies unlawful searches or seizures. In line with such jurisdictions we have condemned them in the strongest terms and pointed out the proper remedy.

2—In view of the foregoing, and the further fact that the Exhibits in question contain references to Montgomery and directly contradict the testimony of Wolf in relation to him, the motions for severances were properly overruled.

3—The Court's refusal to give tendered instruction No. 2 is fully answered by the foregoing.

Tendered instruction No. 1 and Wolf's tendered instruction No. 4 are based upon the failure of the People to call a certain witness. Since he was not endorsed on the information they were not misled and since the record discloses that they had all the essential knowledge concerning him which the People had, these instructions were properly refused.

Other assignments relating to instructions are so devoid of merit as to obviate the necessity for comment.

The judgment is affirmed.

Mr. Justice Hilliard dissents.

IN SUPREME COURT OF COLORADO

MOTION FOR EXTENSION OF TIME FOR FILING PETITION FOR REHEARING—Filed November 10, 1947

Comes now Julius A. Wolf, plaintiff in error, and respectfuily moves this Honorable Court to grant an extension of time in which he may file his Petition for Rehearing, and as grounds therefor states:

1. That the questions involved are of importance and there is difficulty in getting prompt printing.

Wherefore, plaintiff in error requests that he be given [fols. 89-90] fifteen days additional time, that is, until December 2, 1947, within which to file said Petition.

Philip Hornbein, Donald M. Shere, Attorneys for Plaintiff in Error, 620 Symes Building, Denver 2, Colorado—TA. 5174.

IN SUPREME COURT OF COLORADO

ORDER EXTENDING TIME FOR FILING PETITION FOR REHEARING —November 14, 1947

Upon consideration of the motion of the plaintiff in error, Julius A. Wolf, it is this day ordered that the plaintiff in error have to and including December 2, 1947, in which to file petition for rehearing.

[fol. 91] IN SUPREME COURT OF COLORADO:

[Title omitted]

PETITION FOR REHEARING

Comes now the above-named plaintiff in error, Julius A. Wolf, and moves this Honorable Court to grant a rehearing herein for the following reasons:

1. The Court misapprehended our contention with respect to the statutory privileges of physicians. We referred to this statute merely to show the aggravated character of the search and seizure in this case. See page 22 of our Opening Brief and page 15 of the Reply Brief. The point [fol. 92] that we attempted to make was that a search that is calculated to force a doctor's patients to disclose their personal affairs is an unreasonable search, and clearly, in determining whether the search was reasonable or unreasonable, it is proper to consider the nature and purpose of the search.

2. The Court in its opinion states:

> "The second objection is that the seizure and introduction of Exhibits A and C was in violation of Section 7, Article II of the constitution which forbids unreasonable search and seizure and forbids any such search and seizure without a warrant, and Section 18 of Article II, id. which provides 'that no person shall be compelled to testify against himself in a criminal case.'" (Page 3 of the opinion of the Court)

3. We wish to direct the Court's attention to the Record from which it appears that the protection of the fourth and fifth amendments to the Constitution of the United States, which prohibit unreasonable search and seizure, and compulsory testimony in a criminal case, was specially invoked as against the evidence which was obtained from the search and seizure of the books of the defendant (Folios 243-244).

4. In the motion for a new trial which appears at folio 790, the protection of the fourth amendment of the Constitution of the United States was specially invoked three different times. (See paragraphs 1, 3 and 4 of the motion for a new trial, folios 790, 792 and 793.)

[fol. 93] 5. The protection of the Constitution of the United States was again invoked in the assignments of

error filed in this Court. (See page 73, Abstract of Record, Assignments #1, #3, and #4.)

6. That on February 18, 1947, prior to the oral argument of this case, the defendant filed with this Court, the following motion:

"Comes now the plaintiff in error, Julius A. Wolf, defendant below, and moves this Honorable Court to grant a leave to file a supplemental assignment of error as follows:

1. That the Court erred in overruling the Motion of the defendant, Julius A. Wolf, to suppress as evidence certain books and records taken from the possession of the defendant, which records contained names of patients and the nature of their ailments, and other matters which were of a wholly private and confidential nature. Said books being Exhibits A and C in this case. For the reason that said books and records were taken by the District Attorney of the City and County of Denver, a State officer functioning under the authority of the State of Colorado, without a search warrant or any other process of law, and in violation of the rights of the defendant under the due process clause of the Fourteenth Amendment of the Constitution of the United States, and the defendant specifically invokes the protection of the Fourteenth Amendment against said unlawful search and seizure."

[fol. 94] That thereafter the Attorney General of the State tendered written objections to the filing of such supplemental assignment of error on the ground that the matter referred to was already covered in the previous assignments.

After the oral argument and the submission of this cause to this Court, the Supreme Court of the United States rendered a decision which we believe has an important bearing on the constitutional question involved in this case. See *Harris v. United States*, decided May 5, 1947, reported in Advance Sheet 12, Volume 67, Supreme Court Reporter, page 1098.

Respectfully submitted, Philip Hornbein, Donald M. Shere, Attorneys for Plaintiff in Error, Julius A. Wolf, 620 Symes Building, Denver 2, Colorado—Ta. 5174.

[fol. 95] IN SUPREME COURT OF COLORADO

ORDER DENYING PETITION FOR REHEARING—December 8, 1947

The Court having considered the petition of the plaintiff in error for a rehearing in this cause, and now being well and fully advised in the premises, doth order that said petition be, and the same is hereby, denied.

IN SUPREME COURT OF COLORADO

ORDER STAYING EXECUTION—December 8, 1947

On consideration of the motion of the plaintiff in error, Julius A. Wolf, requesting a stay of execution pending application for a writ of certiorari, the objections of the Attorney General thereto, and the answer of Attorneys for said plaintiff in error to said objection; it is now ordered by the Chief Justice of the Supreme Court of the State of Colorado that the execution of the sentence herein against plaintiff in error be, and the same is hereby, stayed for a period of 60 days from this date upon the giving of a good and sufficient bond in the sum of Seventy-five Hundred Dollars ($7,500.00) conditioned as by law provided and approved by the undersigned and to be substituted for any bond heretofore given, whereupon execution shall be stayed as prayed and no remittitur shall issue during said period of 60 days.

Done and signed this 11th day of December, 1947.

H. P. Burke, Chief Justice of the Supreme Court of the State of Colorado.

[fol. 96] Recognizance on appeal for $7,500.00 approved December 17, 1947, omitted in printing.

[fols. 97-98] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 99] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 26, 1948

The petition herein for a writ of certiorari to the Supreme Court of the State of Colorado is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 18

JULIUS A. WOLF, PETITIONER,

vs.

THE PEOPLE OF THE STATE OF COLORADO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

PETITION FOR CERTIORARI FILED FEBRUARY 14, 1948.

CERTIORARI GRANTED APRIL 26, 1948.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No.

JULIUS A. WOLF, PETITIONER,

vs.

THE PEOPLE OF THE STATE OF COLORADO

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF THE STATE OF COLORADO

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[fol. 1]

IN THE SUPREME COURT OF THE STATE OF COLORADO

No. 15670

JULIUS A. WOLF and CHARLES H. FULTON and BETTY FULTON, Plaintiffs in Error,

vs.

THE PEOPLE OF THE STATE OF COLORADO, Defendants in Error

Error to the District Court of the City and County of Denver.

Honorable Joseph E. Cook, Judge.

Abstract of Record

NOTE RE FILING OF INFORMATION

On May 18, 1944, information was filed charging Julius A. Wolf, Charles H. Fulton and Betty Fulton, with the crime of conspiracy to perform an abortion upon one, Agnes Vera Bashor.

[fol. 2] MOTION FOR SEVERANCE BY DEFENDANT WOLF AND DENIAL THEREOF

"Now comes the defendant, Julius A. Wolf, and respectfully moves this Honorable Court to sever the information herein and to grant to this defendant a separate trial and as grounds for this Motion shows unto the Court:

"1. That at the trial of this cause, there will be introduced in evidence matters that would be material and admissible as against the other defendants, and would be inadmissible as against this defendant if tried alone, and that such evidence so admissible and material as against the other defendants does not relate to the reputation of such co-defendants or either of them.

"2. That to try this defendant jointly with his co-defendants would greatly prejudice him in that such evidence affecting the other defendants would not be

admissible, whereas, if this defendant were tried separately such evidence would not be admissible.

"This Motion is supported by the Affidavit attached hereto.

AFFIDAVIT

"JULIUS A. WOLF, of lawful age, being first duly [fol. 3] sworn upon his oath deposes and says:

"That he is one of the defendants mentioned in the above-entitled cause. That this affiant is informed and believes and so states the fact to be, that on trial of this cause, evidence will be introduced by the State, which would be admissible and material as against the co-defendants, Charles H. Fulton and Betty Fulton, and inadmissible as against this defendant if he were tried separately and alone, and that such evidence does not relate to the reputation of said co-defendants.

"That a more particular statement of such evidence is, so this affiant is informed, substantially as follows:

"That after the arrest of this affiant, and while he was in custody, Louis Malach, a special investigator for the office of the District Attorney informed and stated to this affiant that Charles H. Fulton and Betty Fulton made incriminatory statements involving themselves and tending to show their complicity and participation in the offense alleged. That said alleged statements were made by said co-defendants outside of the presence of this defendant, and while the co-defendants, Charles H. Fulton and Betty Fulton were under arrest. [fol. 4] That the evidence of such incriminatory statements would not be admissible and material as against this affiant, if tried separately, but would be as against said co-defendants.

"That there will be other evidence, this affiant is informed, which would be admissible as against his co-defendants, and inadmissible as against him which does not relate to the reputation of said co-defendants, and this affiant cannot more definitely advise the Court as to the exact nature of said testimony.

"This Affidavit is made in support of a Motion for Severance in accordance with the Statute in such case made and provided."

(Sgd) Julius A. Wolf.

Denied 8/26/44, by Judge Cook."

MOTION FOR SEVERANCE BY DEFENDANTS FULTON, AND DENIAL THEREOF

On June 2, 1944, defendants Charles H. Fulton and Betty Fulton filed a Motion for Severance, omitting the formal parts, is as follows:

"Come now, Charles H. Fulton and Betty Fulton and respectfully move this Honorable Court to sever the information herein and to grant to these defendants a [fol. 5] separate trial and as grounds for this Motion show unto the Court:

I

"That at the trial of this cause, there will be introduced evidence of matters that would be material and admissible as against the other defendant and which would be inadmissible as against these defendants if tried alone and that such evidence so admissible and material, as against the other defendant, does not relate to the reputation of said other defendant or so-called co-defendant.

II

"That in the event these defendants are tried jointly with the other defendant, they will be greatly prejudiced in that the evidence affecting the other defendant but not affecting these defendants would be admissible, whereas if these defendants are tried separately or are tried separate from the defendant, Julius A. Wolf, such evidence would not be admissible.

"This Motion is supported by Affidavits attached hereto.

Affidavit

"Betty Fulton being of lawful age, and being first [fol. 6] duly sworn upon her oath deposes and says:

"That she is one of the defendants in the above-entitled cause; that she has filed a Motion for Severance, together with her husband, Charles H. Fulton herein, and has, in said Motion, shown to the Court that there is evidence admissible as to the other defendant which will be admitted at the trial against said other defendant and that said evidence is not admissible as to herself and her husband if tried alone.

"That your affiant is informed that Julius A. Wolf, after his arrest and after the termination of the so-called or alleged conspiracy, made statements to the effect that he, the said Julius A. Wolf, had been sending cases to other people, numerous and sundry persons, the names of such persons being unknown to your affiant and that the said Julius A. Wolf made statements and admissions concerning himself, which do not involve these defendants in any conspiracy or criminality but which, if these defendants are tried jointly will reach the ears of the jurors to the irreparable damage and prejudice of the defendants and prevent them from having a fair trial under the statute.

[fol. 7] "Your affiant is further informed that Julius A. Wolf called upon individuals alleged to be involved in this alleged conspiracy and did things and made statements not admissible against these defendants if tried jointly but which would be admitted in evidence against Julius A. Wolf and therefore inherited by these defendants or admitted in the same trial if these cases are tried jointly but which would not be admitted if tried alone; that the admissions, statements and incriminations of Julius A. Wolf do not relate to the reputation of them.

"Further your affiant sayeth not.

(Sgd) Betty Fulton.

Affidavit

"Charles H. Fulton of lawful age and being first duly sworn upon his oath, deposes and says:

"That he is one of the defendants above named, that he has filed his Motion herein for Severance based upon the statutory ground of evidence admissible against him if tried jointly but inadmissible against this defendant if he and his wife, Betty Fulton, are tried separately.

"Your affiant is informed that at the trial of this [fol. 8] cause there will be evidence introduced of admission and statement of Julius A. Wolf not relating to reputation and not admissible against this defendant or his wife, Betty Fulton, if tried alone and your affiant is informed that Julius A. Wolf has made incriminating admissions, after the termination of the alleged conspiracy and has said that he forwarded cases

to persons unknown and unheard of by these defendants and has made other statements admissible to himself but not admissible against Charles H. Fulton and Betty Fulton, if tried alone.

"Further your affiant sayeth not.

(Sgd) Charles H. Fulton."

"Denied 8/26 by Judge Cook."

MOTION TO STRIKE MOTIONS FOR SEVERANCE AND DENIAL THEREOF

On June 9, 1944, District Attorney filed a Motion to Strike Motions for Severance on the ground that the same were vague, indefinite, and a sham, and insufficient in law to support the Motion.

On August 21, 1944, Motion to Strike Motions for Severances denied.

[fol. 9] MOTION OF DEFENDANT WOLF TO SUPPRESS AND RETURN EVIDENCE—Filed February 10, 1945

Now comes the above-named defendant, Julius A. Wolf, and respectfully shows unto the Court as follows:

"1. That he, the defendant, was in possession of certain books and records, a more particular description of said books and records is hereinafter set forth, which books and records were kept by the defendant in his professional capacity as a physician and surgeon duly licensed, qualified, and practicing in the City and County of Denver, State of Colorado.

"2. That said books and records contained the names of his patients, the treatment which he was administering, and in some instances the ailments from which they were suffering. That it was necessary for the defendant to keep said books and records in order to carry on his profession. That while said books and records were in his possession, the District Attorney of the City and County of Denver, State of Colorado, wrongfully and unlawfully seized and took away the books and records of the defendant depriving him of their use, custody, and inspection, in violation of Article

2, Section 7 of the Constitution of the State of Colorado, [fol. 10] and of Amendments 4 and 5 of the Constitution of the United States.

3. "That said search and seizure was made by the attaches of the District Attorneys office without any search warrant or order of Court, or any other authority whatsoever, in violation of the Constitution of the State of Colorado, and of the Constitution of the United States, which gives to each person the right to be secure in the possession of their books and records.

"4. That on February 5, 1945, the District Attorney endorsed upon the information in the above-entitled cause; the names and addresses of five persons, to-wit:

Juliana Zurcher, 1826 Sherman Street
Prudence Rockman, 1120 Pearl Street
Eloise M. Gorman, 2531 Front View Crescent
Barbara Blitz, 1351 Grant Street
Margaret L. Rogers, 3534 West 45th Avenue

[fol. 11] whom the District Attorney intends to call and use as witnesses, but this defendant states that the testimony of said witnesses which the District Attorney intends to use was obtained wholly by his wrongful possession of the private books and records of this defendant, which he wrongfully seized in violation of the Constitution aforesaid.

"5. That if said witnesses are permitted to testify under the circumstances, the defendant will be compelled to give testimony against himself in a criminal case, all in violation of Article 2, Section 18 of the Constitution of the State of Colorado, and of amendments 4 and 5 of the Constitution of the United States.

"6. Further, the books and records used by this defendant in the course of his professional business were privileged and contained information which under the statute, in such case made and provided, can only be divulged and disclosed with the consent of the various persons, named in said books and records, and that it is the defendant's obligation under the statute in such case made and provided to withhold the disclosure of any information communicated to him by any patient in his professional capacity, and the seizure and use of said books and records by the District Attorney is a violation of the statute which makes communication

[fol. 12] between the patient and physician privileged and inviolate.

"7. That the books and records so seized are more particularly described as:

One 1943 Day Book
One 1944 Day Book

which are now in possession of the District Attorney.

"Wherefore, defendant prays that this Honorable Court may enter an order herein directing the District Attorney to forthwith return the books and records to this defendant, and that the information obtained therefrom be suppressed, and that the testimony of the witnesses which the District Attorney obtained as a result of said wrongful seizure of said books and records be suppressed.

"State of Colorado,
City and County of Denver, ss:

Julius A. Wolf, of lawful age, being first duly sworn upon his oath, deposes and says:

That he has read the above and foregoing Motion, knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which [fol. 13] are therein stated on information and belief, and as to those matters, he believes them to be true.

Sgd. Julius A. Wolf."

Argument on Motion to Suppress and Return Evidence

"Mr. Hornbein (continuing): In support of this Motion, I would like to offer some oral testimony, and we will argue the Motion.

"Is Juliana Zurcher in the court?"

The District Attorney objects to the taking of any testimony.

"Mr. Hornbein: We are limiting the testimony to this motion, that is all. We simply want to ascertain from these witnesses whether they were patients, and we want to show in other words, that it was through the search and seizure in the doctor's office; private

office of his private books, a procedure that has never occurred in the history of jurisprudence in this country. We argued that fully before Judge Black. We took a couple of days, and the judge ruled as a matter of first impression, and without giving very serious thought, that we were permitted to introduce witnesses at that time, that is rather, to say, the Court required the [fol. 14] attendance of Mr. Humphreys and Mr. Malach of the District Attorney's office. We have that record. Here is the situation that is different in the case before Judge Black. In that case it was simply a case of the prosecuting witnesses; they found out from getting the books, of one Mildred Cairo. In this case they go out and get the books and records, and we will show these books which were seized are privileged and inviolate. They look up the names of the patients and go out and bring them in and ascertain from them what their ailments and trouble was, and that is all we want to show; that they get these women to become witnesses, and we will argue that after we hear the witnesses.

"I said that is all we are going into. We maintain that the District Attorney was absolutely without right to go into this doctor's private office without any warrant; without any order of court; and engage in a general raid, and take his private books, and then with those books, open them up and find out the names of the patients; this information which is privileged under the law, and go out and contact the patients to see whether any law had been violated. Now the grand jury, or the court would not have a right to compel a doctor to bring his books in and engage in a searching expedi- [fol. 15] tion, and look at his patients and find out who they were and check them up and see if any law was violated. That goes to the very confidential relationship. That is all we want to show. The difference between this case and the other one, it wasn't used as a drag-net it was used on one woman who was the prosecuting witness, but here these people are not prosecuting; they are strangers; all they know about it is they were patients in Dr. Wolf's office. And they check up and bring them in and find out what was the matter, and bring them in as witnesses; and I say, that is not right, and not constitutional, and we want to make a record and get this before the court, so we will know.

"Mr. Anderson: I wish to say this, your Honor. The situation is no different at all then it was when this entire matter was fully argued before Judge Black in Division VI; and that is the case; the same claim was made as against the prosecuting witnesses. Here that is not the situation; they have these five other witnesses. The first point is, to determine whether evidence obtained through any means is admissible or is not admissible. We took the position at the outset that legally obtained or illegally obtained it cannot be attack-collaterally. Suppose for the purpose of the argument you have illegal possession or seizure; this has nothing [fol. 16] to do with admissibility in the trial. Now Judge Black in that particular case did decide he wanted to find out whether it was obtained illegally; whether or not there was a violation of the search and seizure procedure, and that was determined, and his Honor found there had been no illegal search and seizure. And the only purpose of this motion is to attack and suppress these women's evidence. What evidence—the evidence that was obtained in a particular way. It does not make any difference how that evidence was obtained. It is admissible in the trial if it fulfills the other requirements of evidence, that is, that it is material and relevant, and that it is competent. How it was obtained—the jurisdiction of Colorado does not follow the Federal rule on that, and I recall arguing the matter fully at that time. There were any number of cases cited by the decisions of the federal courts, and all this attempt to present evidence and now bring the People's witnesses on to question them concerning one thing or another is entirely beside the point. It is beclouding the issue. It would seem to the People, at this time, as to whether or not the evidence is material and admissible, that that is not properly done in a collateral proceeding. These people have been endorsed as witnesses, yes, but it is entirely within the province of the [fol. 17] People whether they are going to present that evidence, or any at all, but if at the time the evidence is presented, the defendant at the time of trial will have ample opportunity to examine them, and offer any objection, if any they have, and the court will rule. To attack a collateral issue is not proper, and I submit this

entire motion should be dismissed, as an attempt to attack evidence collaterally.

"Mr. Dickerson: Now if your Honor please, we have an interest in this too, and counsel seems to avoid the thing that we are offering here. These girls do not have to testify if they don't want to, and they have been warned by previous judges they don't have to testify. But, as a matter of practice, this is what happened: They go out and break that solemn right the girls have; as well as the doctor, and that is the question that is most seriously affected, as I see it here. And I don't care whether these girls want to have an abortion or what they want—they are entitled to have that confidential relationship held inviolate, and so is the doctor. If every woman that went to see a doctor about an abortion should be dragged into court and compelled to testify, in violation of the confidential relationship; that that is a sacred confidence; the courts wouldn't hold that; they must have the protective assurance the [fol. 18] court has set up. When the district attorney, all powerful, can go anywhere; if they can do that, they can go into your Honor's confidential records, or your practice, and see who consulted you about what; the confidential relationship established by statute is destroyed. The district attorney can violate all laws? He can't.

"Before your Honor can rule on this question, your Honor has to be advised, and whether your Honor can be advised, we have to find out from these people, and we have a right to know, and have a right to ask them all the questions we choose. That is why we are given a list of the names, in order that we may interview them or communicate with them, or whatever is necessary.

"But in this case, here is a case we will show by evidence that the district attorney seized the private records, and went through it and took the names of patients who had gone there under a confidential protection, and he shattered it and broke it and used it to prosecute somebody with, at the embarrassment of everybody concerned, and with this position there is no such thing as a confidential record or confidential relationship. Before this case is over we are going to find out about that; and the purpose these people are

[fol. 19] brought here for, and we are properly interested, because the harm falls on our shoulders; and in conspiracy cases that latitude is so wide, and Judge Black warned, when the girls were put on the stand, Judge Black warned them they didn't have to reveal these facts, and some of them elected not to."

Further arguments of counsel and district attorney.

DENIAL OF MOTION TO SUPPRESS AND RETURN EVIDENCE.

Court sustains objection of district attorney; defendants excepted.

OFFERS OF PROOF.

"Mr. Hornbein: I suppose we should make a record your Honor. The defendant wanted to call in support of the motion, the witnesses:

Juliana Zurcher
Prudence Rockman
Eloise M. Gorman
Barbara Blitz, and
Margaret L. Rogers,

and the defendant desires to prove by these witnesses that they were patients of the defendant Wolf, sometime in the month of April, and that at no time did they consent to have the nature of their ailment or trouble disclosed by the defendant Dr. Wolf.

[fol. 20] "And further, we want to show that the only way that the district attorney obtained knowledge of the fact that they were patients of the defendant, was because their names were entered into a book and record kept by the defendant Wolf in his professional capacity as a physician, and that is as far as we wanted to go with these girls. We wanted to prove by other witnesses that these books were obtained by wrongful search and seizure.

"Mr. Anderson: Let the record show at this point, your Honor, in pursuance of the offer of proof just read into the record, that subsequent to the arrest of these two defendants, the proposed witnesses have not been interviewed by the defendants or defendants' counsel,

and therefore the offer of proof as so stated can only be a mere suspicion, guess or surmise on the part of counsel as to what they would testify to concerning their willingness or unwillingness to have their testimony discussed.

"The Court: Overruled.

MOTION TO TAKE DEPOSITIONS AND DENIAL THEREOF

"Mr. Dickerson: At this time on behalf of Dr. Fulton and Betty Fulton, we request permission, in view of the fact these witnesses are present in court, to take the [fol. 21] depositions of these witnesses, in order to ascertain some of these facts, as well as to determine what their evidence is, and what its relationship is to this case. And we make a formal application to take the depositions of

Juliana Zurcher, 1826 Sherman Street
Prudence Rockman, 1120 Pearl Street
Eloise M. Gorman, 2531 Front View Crescent
Barbara Blitz, 1351 Grant Street, and
Margaret L. Rogers, 3534 West 45th Avenue.

They are present here in the court room and we desire to take their depositions.

"Mr. Anderson: Now, again we offer the following objection, your Honor. First that the deposition not being in accord with common law, you must follow the proceeding exactly as the statute lays it down, and that has not been done in this case. And by the admission of counsel, it partakes of attempts to discover, and there is no provision for the discovery of things in law. And I might state the witnesses will be available at the time of the trial.

"Mr. Hornbein: That is the trouble, when we get [fol. 22] into the trial. Is Mr. Malach, Mr. Thayer and Mr. Humphreys in here?

"Mr. Rice: You didn't subpoena them.

"Mr. Anderson: Have you subpoenaed them?

"Mr. Hornbein: I just asked the question.

"The Court: Would you like to call Mr. Malach and Mr. Humphreys?

"Mr. Hornbein: Yes. We have the record of Franklin Thayer, Ray Humphreys and Louis Malach. The

substance of that testimony is simply this: They went into Dr. Wolf's office without any search warrant, without any authority of court, or order of court and took his private books, and they examined his books, and from the examination they discovered the name of the woman in that case; Mildred Cairo, and from that they filed an information. Now the names of these girls are not listed, and Judge Black permitted us to show that.

"The Court: We can hear that later, when they are called in.

"Mr. Hornbein: Yes, except we don't like to have [fol. 23] to delay the trial.

"The Court: There is nothing to prevent you from calling them later.

"Mr. Hornbein: Yes, except we don't like to have to delay the trial.

"The Court: There is nothing to prevent you from calling them later.

"Mr. Hornbein: Won't you stipulate we need not go through this?

"Mr. Anderson: We submit, your Honor.

"Mr. Hornbein (interrupting:) I want to offer in support of this motion, the testimony of Franklin Thayer, Ray Humphreys and Louis Malach, given out of the presence of the jury concerning the circumstances under which the records and books which were the subject matter of this motion were taken out of the custody and private office of the defendant Wolf by these attaches of the district attorney's office.

"The Court: On Mr. Dickerson's (typographical error, should be Mr. Anderson's) Motion, the motion will be overruled.

"Mr. Dickerson: Exception.

"Mr. Hornbein: I am offering that in evidence.

[fol. 24] "Mr. Anderson: I will object, your Honor, and make the same objection I made before. I object to any consideration by the court; there is nothing before the Court.

"The Court: Sustained, and we will permit you the right to have them here at the time of the trial.

"Mr. Hornbein: And your Honor will go into that later after we go into the trial?

"The Court: Yes.

"Mr. Hornbein: The whole thing is open for consideration?

"The Court: Yes.

"Mr. Hornbein: I will withdraw the exhibit, and I understand the rule of the court is, the whole matter is left open until the time of the trial, when these matters can be raised.

"The Court: Yes.

"Mr. Hornbein: Whether the motion will be considered at the time of trial.

"Mr. Anderson: The motion here is to suppress and [fol. 25] return illegally obtained evidence. That is the only motion presented at this time on which he has argued, and this offer of proof has been presented you have ruled on at this time. That does not preclude the defendant——

"The Court (interrupting:) The court was about to rule on the whole motion.

"Mr. Hornbein: The court has not heard the main argument on the motion.

"The Court: Do you want to argue?

"Mr. Hornbein: Certainly.

"Mr. Anderson: Now what are you arguing on?

"Mr. Hornbein: On the motion. About the points of this motion. The court knows that there is a violation of the defendant's constitutional rights, when the district attorney went in there and took his books and records, without any warrant, without any authority.

Arguments and Citations.

(11:53 A. M. to 12:46 P. M.)

[fol. 26] "The Court: Gentlemen, we will decide the case at nine o'clock Tuesday morning. I want these books. We will adjourn until Monday morning at nine-thirty."

February 20, 1945, motion denied by the Court and exceptions saved by defendants.

PLEAS

August 26, 1944, defendants, Julius A. Wolf, Charles H. Fulton and Betty Fulton entered pleas of not guilty.

February 28, 1945, the case came on for trial before a jury.

Statement of Evidence

AGNES VERA BASHOR, a witness called on behalf of the People, testified as follows:

Direct examination:

My name is Agnes Vera Bashor, and for six weeks I have lived at 246 Hazel Court. I am not married and I am 26 years of age. In April of 1944, I lived in an apartment house at 975 Bannock Street and I know the defendant, Dr. Charles H. Fulton, his office is located in the Denver Theater Building. I went to see him and told him I was in trouble and wanted an abortion. He examined me and said that I was about five months along, and that his fee would be $1,000. He asked me where I was staying, and I told him [fol. 27] that I didn't have a phone at my apartment, and he told me that I would have to stay at a hotel. I left his office. I called him on the phone later and asked him if I could raise the money if he would arrange the operation. He said he didn't want to talk about it on the telephone, and told me to come to his office the first of next week. I saw him then and told him I could raise the money. He told me that Dr. Wolf was the doctor and he sent me over to see him for an examination. I went to Dr. Wolf's office in the Republic Building. He examined me, I had never seen him before. He gave me an external examination. Did you have any conversation with him? Question objected to by Mr. Zarlengo in behalf of the defendant, Betty Fulton.

"Mr. Zarlengo: After the conspiracy has once been done there is nothing to show; I object to it.

"The Court: I will reserve the ruling and you may renew it later."

Dr. Wolf asked while I was still in the examining room, "Why didn't you wait the whole nine months before you came to have anything done?"

"'Did you have any conversation about what you were to use these telephones——'

"Witness: After Dr. Fulton performed the abortion [fol. 28] I was to call him when I needed him."

The only further conversation I had with Dr. Wolf was when I left he told me any time I needed him to call him, and he would come to me. After I left Wolf's office I went to Dr. Fulton's office.

Fulton told me that he would find a hotel for me and wanted to know what name I was going to give at the hotel so that Dr. Wolf would know who to call. I decided on the name of "Verna Brown."

The next time I saw Dr. Fulton was on April 27. He gave me his address and direction how to get there. The address was in Arapahoe County.

I own a 1941 Pontiac, four-door sedan. I got two checks and I took them to Colorado National Bank and cashed them at about three in the afternoon into ten $100 bills, which I took back to Fulton. I gave him the money and he put the bills in his bill fold.

I went to see him at his home at 5:30. A lady dressed in a nurse's uniform met me at the door. It was the first time I had seen her. I had a conversation with her. She said, "Is this Miss Bashor," and I said "yes." She took me into a room and helped me remove my clothing.

[fol. 29] She didn't talk very much, she just told me where to lay my clothing, and stayed with me in the room until the doctor came in.

As soon as Dr. Fulton came in she went out. He inserted some kind of tube and brought me some pills and gave me instructions how to take them.

"Q. Just state what, if any conversation you had about those pills at that time.

"A. There was an envelope with two pills in it, and he told me to take one as soon as I got to the hotel, and not to take the other one until Dr. Wolf came, and he gave me some pills in the box, and told me not to take those until Dr. Wolf came."

Counsel objects to any further testimony on the ground that the alleged conspiracy had been consummated, and that such evidence was not admissible against Dr. Wolf.

Objection overruled, exception saved.

People's Exhibit "A" and "B" are identified.

When I was at Dr. Fulton's office he left something inserted and told me not to remove anything until Dr. Wolf came.

[fol. 30] I had a further conversation with Dr. Fulton. He told me that if I wanted Dr. Wolf at any time to call him and that he would come. He told me to take one pill and lie down as soon as I got to the hotel.

Betty Fulton helped me dress. I had no further conversation with her. I left. I went to the West Hotel in the 1300 block on California Street.

I went to the desk and told them who I was and that Dr. Fulton had reserved a room for me.

People's Exhibit "C" is marked for identification.

It is a card I filled out at the hotel. It is in my handwriting. I went to my room, took the pill and laid down.

Witness is shown Exhibit "A," she identifies envelope from which she removed the pill.

I dozed off. The telephone rang about 10. I received two telephone calls. I went to the bath room and removed the tube which was about 12 inches long and flushed it down the toilet, and got dressed. I was not in much pain, but I was flowing.

I went to a cafe and called a friend.

[fol. 31] "Mr. Dickerson: We object to something about the Abbott Hotel.

"The Court: Objection sustained.

"Mr. Rico: Please read the last answer.

(Reporter): "I went to a cafe and called the Abbott Hotel, where I had a friend, and I told him what had happened and asked if he would drive the car for me."

"The Court: Objection overruled.

"Q. The court says you may continue.

"Mr. Dickerson: Is it overruled?

"The Court: Yes.

"Mr. Dickerson: Save an ex-tion."

I got my friend and we went to a cabin on West Colfax. He drove my car. It was about 1:30 after midnight. My friend's name was Jim Hayes. I have known him eleven or

twelve years. The camp was two or three miles out on [fol. 32] West Colfax. I registered. I was getting pretty sick and went to bed. The next morning about ten o'clock Hayes left for about thirty minutes.

"A. Well I was in so much pain he went and got some anacin for me to take, and he was getting pretty much disgusted by that time; he couldn't get a doctor, and he wanted to take me to the hospital.

"Mr. Dickerson: We object to that as not admissible.

"The Court: Yes, we will stop at the point of conversation.

"Q. State what you did, and Mr. Hayes did?

"A. I didn't want to go to the hospital, because I felt either Dr. Wolf or Dr. Fulton, one would show up after they had been called.

"Mr. Hornbein: Just a moment, if the court please we object to that. That is purely guess, she thought Dr. Wolf would show up, or Dr. Fulton would show up.

"Q. Had they been called on the telephone?

[fol. 33] "Mr. Hornbein: Did she call them on the telephone?

"Mr. Rice: No, you can find out——

"Mr. Hornbein: No, I object to the district attorney trying to get in evidence which is not proper. They are trying to get some evidence, or get in the idea this friend, whom we don't know, and whom we have never seen; they are trying to slip in the inuendo that he called or tried to call some doctor, and she didn't know anything about it.

"The Court: Any reference, she 'thought' would be stricken.

"Mr. Hornbein: And I asked these remarks be stricken out; she thought the doctor would come.

"The Court: The remarks will be stricken.

"Mr. Rice: I object to the remarks being stricken.

"The Court: I am talking about the remarks of the witness.

"Q. Go ahead Miss Bashor and tell us what occurred and what happened at the cottage camp?

[fol. 34] "A. There was telephone calls made, and about three-thirty he left and said he was going to do something.

"Mr. Dickerson: There they go again your Honor, and they continually do it; the witness should be cautioned your Honor.

"The Court: Miss Bashor, these conversations under the rules of law, conversations are not admissible, so don't tell what you said to him, or what he said to you.

"Witness: Well, I was all alone about four-thirty and I miscarried."

Observed two different objects, the afterbirth and the fetus.

I flushed the bowl.

I saw Mr. Humphreys of the district attorney's office first. I was in the cottage camp the night of the 27th, and the morning of the 28th of April.

I never paid the defendant Wolf any money, nor did I have any conversation with him concerning his fee.

I gave Mr. Humphreys Exhibits "A" and "B."

[fol. 35] Cross-examination:

I never saw a fetus before, but I knew that I miscarried.

I became pregnant the month of December.

"Q. Miss Bashor, describe to the jury what you saw?"

Objection sustained by the Court; exception saved.

I appeared before the Court in June, 1944, at the taking of my deposition.

"Q. And at that time and that place, were you asked these questions; reading from page 18? 'Do you know Mr. J. J. Hayes?' Answer: 'I do not.'

Objected to by Mr. Anderson.

Objection sustained by the Court.

"Q. Well, do you know any one by the name of Hayes?

"A. Yes.

"Q. But you swore in your deposition you didn't?

"A. Not J. J. Hayes.

[fol. 36] "Mr. Rice: We will object to that as not a proper question.

"The Court: Objection sustained.

"Q. You stated, this however; 'You don't know anyone by this name?' And you answered, 'No.'

"Mr. Rice: I object to that, not even the law——

"The Court (interrupting): Objection sustained.

"Mr. Hornbein: If you have a deposition the witness has given, you can ask the witness whether she made such a statement, and find out whether there is a contradiction. He has gone further, he has asked if she knows a man by the name of Hayes; she says 'yes,' now he has a right to show before this very court, when her memory was even fresher than it is today; she got up on that stand and swore she didn't."

I have known Jim Hayes for twelve years. He is just a friend of the family.

"Q. Went out with him from time to time?

"A. No.

[fol. 37] "Q. You didn't?

"A. No.

"Q. You swore in your deposition you did, didn't you?

"A. Why sure, I have gone to shows with him.

"Q. Why did you say a moment ago you didn't go out with him?

"A. I wouldn't call that going out, in the sense you mean, no.

"Q. Do you know who was responsible for your pregnancy?

"Mr. Rice: We object as being immaterial in this case.

"The Court: Objection sustained."

Arguments by counsel; exceptions saved.
The Court sustains objections.

"Q. In your deposition you said that you drove the car out to the cottage camp—you don't need to look at the district attorney."

"Mr. Anderson: I was going to make an objection, [fol. 38] for the reason no proper foundation has been laid for any statement concerning that trip.

"The Court: Object on sustained.

"Mr. Dickerson: Save an exception.

"Q. In your deposition that you gave here in this court, which we have identified, you testified to the manner in which you got out to the cottage camp, didn't you?

"Mr. Anderson: We object to the question, on the ground, no foundation has been laid.

"The Court: Objection sustained.

"Mr. Dickerson: Save an ex-tion.

"Q. And you have previously sworn under oath that you drove your car out?

"Mr. Rice: If the court please, we ask the court at this time to instruct counsel not to make statements contrary to the ruling of the court.

[fol. 39] "The Court: Objection sustained.

"Mr. Rice: And we ask that the jury be instructed to disregard it.

"The Court: It will be stricken.

"Mr. Anderson: And we ask the court to reprimand counsel for overriding the court, which we can do by indirection.

"The Court: The court has ruled on the form of that question, and has sustained the objection.

"Mr. Dickerson: Now, your Honor, I want this in the record——

"Mr. Rice: We object to any further—any offer of proof.

"Mr. Anderson: We object to offer of proof before the jury.

"Mr. Dickerson: Maybe they better object to our defending the case.

"Mr. Anderson: Unless you can do it properly, yes, sir.

"The Court: Gentlemen, you will be excused from the room; retire to the jury room.

[fol. 40] Proffer.

"Mr. Dickerson: If your Honor please, we offer to prove that this witness previously made a sworn statement, under oath, contrary to the statements she made here this morning; not only one instance, but in

many many instances. And I offer to show by the transcript that was taken in this case; I offer to show now specifically in this matter, that this witness swore she drove out to this cottage camp; that is what I am offering to show."

Argument by counsel.

"The Court: Gentlemen, we will proceed, and if the object is to impeach, we will lay the proper foundation."

I made plans to destroy my child as soon as I knew I was pregnant.

Immediately after leaving the cottage camp, I went to a restaurant on Curtis Street.

I made no effort to get in touch with any doctor.

When we came into town we went to see a man on Market Street about who was a good lawyer to go to.

While I was at Fulton's house I saw two women in the [fol. 41] sitting room, one is employed by the District Attorney's office.

I went over my testimony with the members of the District Attorney's office.

I was examined by a doctor at the Denver General at the request of the District Attorney's office.

"'Q. Did you know he was going to be at that restaurant?'" Reading verbatim from the record from page 31 of the record.

"Mr. Rice: I will object to any question from the deposition.

"The Court: Objection sustained.

"Mr. Dickerson: Save an exception.

"'Q. When did you make arrangements to meet Mr. Hayes at that restaurant?"

"Mr. Rice: If the court please, we object.

"The Court: Objection sustained.

"Mr. Dickerson: And I want the court to know I [fol. 42] am reading these questions verbatim.

"The Court: Yes.

"'Q. You don't know what day or what hour or what place or under what circumstances you made the

arrangements to meet Mr. Hayes at the American Cafe on Curtis Street?'

"Mr. Rice: I object to that because it was gone into this morning.

"Mr. Dickerson: That is verbatim; I am reading from page 32.

"The Court: Objection sustained.

"Mr. Dickerson: Save an exception.

"Mr. Rice: Is that objection sustained to any further questions?

"Mr. Dickerson: I would like to make that clear right now. Am I precluded from asking her any questions concerning what she swore to when her deposition was taken in this court, where it appears she swears opposite from what she testified to today?

[fol. 43] "Mr. Anderson: We want to make two objections. First; the matter was fully gone into by counsel this morning, and apparently now has devised new methods to adopt, and the method he has adopted still is not the proper way to lay a foundation.

"The Court: Objection sustained.

"Mr. Dickerson: I would like a ruling on the question I have just propounded.

"The Court: Yes, in that manner——

"Mr. Dickerson (interrupting): I am precluded from asking anything about the subject matter that this witness testified to when her deposition was taken in this case?

"The Court: No, when the foundation has been laid, but the subject has not been covered——

"Mr. Dickerson (interrupting): I offer to show by her——

"Mr. Rice (interrupting): We object to any offers of proof in front of the jury.

[fol. 44] "Mr. Dickerson: We will make them any way you want to, but I want that in this record.

"Mr. Rice: Your Honor, counsel knows it is improper to make the offer——

"Mr. Dickerson (interrupting): I don't know any such things.

"The Court: Well gentlemen—(to the jury).

"Proffer:

"Mr. Dickerson: We are going to offer to prove that the witness Vera Bashor testified directly opposite to her testimony today, in the deposition that was taken in this court, which has been previously identified, and for greater certainty, we now identify it as deposition number 36383, Division 7, The People of the State of Colorado, versus Julius Wolf and Charles H. Fulton and Betty Fulton, The Deposition of Agnes Vera Bashor; the same witness who is now on the witness stand, taken in open court on Friday, June 30, 1944, before the Honorable Wm. A. Black, Judge of the District Court, in and for the City and County of Denver, State of Colorado, pursuant to notice and order to take said deposition of said witness for the [fol. 45] People in the above-entitled cause. And that the appearances were, at that time: William L. Rice, Esq., Deputy District Attorney, for the People; D. M. Shere and Philip Hornbein, Esq., for the defendant Wolf. F. E. Dickerson, Esq., for defendants Fulton. And that on that day, as appears from the transcript on page 31 of her deposition, among other things, the following things were said:

"Mr. Rice: If the court please, counsel is making their offer of proof quoted from the deposition heretofore taken in this case, and on page 33 of that deposition, the following questions were deleted:

"Q. Well, then, about what time on the 28th of April? A. Maybe 30 minutes before that.

"Q. Maybe 30 minutes before you met him at the restaurant? A. Yes."

"Now if the court please, with that addition to the record, the People wish to object to the offer of proof as made by counsel, for the reason that this matter has been thoroughly gone into upon cross examination by counsel this morning before the noon recess. That this is not the proper method or means or way to lay the foundation for impeachment, and, further that if [fol. 46] the court should allow impeachment upon these questions as have been set forth from this deposition, that it would be impeachment upon an immaterial matter, if they are able to show any impeachment at all. The People further submit that questions

and answers as read from the deposition are not different answers, when taken as a whole, than the testimony given by this witness on direct examination before the making of this offer of proof."

"Mr. Dickerson: I have another offer; does your Honor care to rule on that?

"The Court: Yes, objection sustained.

"Mr. Dickerson: Save an exception."

"Proffer:

"Mr. Hornbein: On page 18 of the deposition of Miss Bashor, I want to prove that she made statements under oath inconsistent and directly opposite to her testimony today. Which questions are as follows:

" 'Q. Do you know Mr. J. J. Hayes? A. I don't. [fol. 47] "Q. You don't?' A. No.

"Q. You don't know anyone by that name? A. No.'

"And then on page 24 of the same document:

"Q. A minute ago you swore you did not know J. J. Hayes.

"A. I don't know J. J. Hayes.

"Q. You knew whom I was talking about when I asked you if you knew Mr. Hayes. A. I answered your question truthfully, I don't know J. J. Hayes.

"Q. So you know James Hayes. A. Yes.

"Q. And you told me you didn't know him. A. I don't know a J. J. Hayes.

"Q. Now, Madam, let's get this straight. You knew to whom I referred when I asked you if you knew J. J. Hayes, didn't you? A. I answered your question, I didn't know J. J. Hayes.

"Q. What is Mr. Hayes' middle initial? A. L.'

"Now I say that is directly opposite to her testi- [fol. 48] mony this morning; it all hinges on an initial, and we say that we are entitled to show that, so that we can argue it to the jury properly; that this witness did not testify truthfully; that she tried to conceal the fact that she knew this man, and that she knew absolutely who the man was; a Mr. Hayes whom we referred to, and we want to show to the jury that this witness is lacking in frankness and in candor; that if she had been frank as she should be, when she was asked 'Do you know a J. J. Hayes?' she would not

have dodged and equivocated by saying she didn't know him, when she knew there was a Mr. Hayes whom she did know, whom we were talking about. An honest answer that a frank and truthful witness on the stand, or off the stand, would make when he is asked the question: 'Do you know a Mr. J. J. Hayes?' a truthful and candid witness would say: 'I don't know his initial—' or, 'I do know his initials; but I do know a man by the name of Hayes, and I do know him very very well.' Which she did. Knew him well enough to call him at the Abbott Hotel to take her to a cottage and be with her all the next day, and take her to Boulder. And she said she didn't know him, merely because we had a wrong initial. And therefore, we are entitled to take that to the jury in our argument, as to whether [fol. 49] this witness, who is the principal, or prosecuting witness, upon her testimony, whether or not she is a frank and candid and truthful person or not; that is the purpose."

Court sustains objections and defendants save exceptions.

"Q. When you talked to any members of the District Attorney's office, or investigators, was anything said about punishing you for your crime?"

"A. No, all they said, they never had punished women."

Cross-examination.

By Mr. Hornbein:

I was at Dr. Wolf's office on just one occasion.

I told the girl in the reception room that I wanted to see Dr. Wolf.

Dr. Wolf came out of his office into the reception room and I went in. He never gave me any drugs, medicine, or used any instruments, but he called me by name.

Cross-examination.

By Mr. Zarlengo:

I never saw Betty Fulton in Dr. Fulton's office. I only [fol. 50] saw her at the place where she lives in Arapahoe County.

I used a number of alias-. After I left the cottage camp, I didn't call any doctor. I tried to get a good lawyer. Then we went to Boulder and I stayed at his house for four days.

Mrs. Fulton was dressed in white. She had no cap on, and I don't remember whether she had on white shoes and stockings. I don't remember seeing any insignia or name of a hospital. She didn't help me take my clothes off. She just stayed in the room and when the doctor came in she left. She never administered any drugs or used any instruments.

Louis Malach, a witness called on behalf of the People, testified as follows:

Direct examination:

My name is Louis Malach. I am an investigator for the District Attorney.

People's Exhibit "D" and "E" are marked for identification, which are the books which Mr. Thayer, from the District Attorney's office, took from Dr. Wolf's office on April 27, 1944.

These books have been in our possession ever since.

[fol. 51] I was with Mr. Thayer when the books, which were the records of Dr. Wolf's business with the names of his patients, were taken.

Out of the presence of the jury, the following proceedings took place:

"Proffer.

"By Mr. Hornbein:

"Q. Now I want to make an offer of proof. Are you an attorney?

"Witness Malach:

"A. No, sir.

"Q. You are not any attorney?

"A. No, sir.

"Q. But you are an officer of the law?

"A. Yes, sir.

"Q. You are a deputy sheriff?

"A. That is right.

"Q. You are an investigator of the District Attorney's office?

"A. That is right.

"Q. Did you take an oath of office?

"A. I did.

[fol. 52] "Q. You did.

"A. Yes.

"Q. Did that oath of office that you took; do you remember swearing you would support the constitution of the State of Colorado? Did you?

"A. Just a moment and I will take a look at this.

(Witness taking paper from his pocket.),

"Q. How is that?

"The Court: He wants to refer to his oath.

"Q. That is right, he ought to.

(Witness looking at paper.)

"Q. Was the 'constitution' in that oath?

"A. That is right."

I was told by Mr. Humphreys that I could take books and records incident to an arrest and other evidence.

I swore to uphold the constitution, but this was never mentioned.

I looked up the names of Dr. Wolf's patients from his [fol. 53] books and brought the women to our office for questioning. I got the names of Juliana Zurcher, Prudence Rockman, Eloise M. Gorman, Barbara Blitz, and Margaret L. Rogers, from these books.

I don't remember whether we showed them the book. They were naturally embarrassed.

Arguments of counsel.

Franklin Thayer, a witness for the People, testified as follows:

I am deputy district attorney for the City and County of Denver. I was so employed in April, 1944, on which date I went to Dr. Wolf's office in the Republic Building with Mr. Malach. I was present when Dr. Wolf was placed under arrest. I first saw People's Exhibits "D" and "E" in Dr. Wolf's office.

Exhibit "E" was on a table in the reception room.

Exhibit "D" was on a book case at the side of the wall. I picked up these two exhibits and delivered them to Louis Malach.

Cross-examination.

By Mr. Dickerson:

I did not ask the defendants Dr. Fulton or Betty Fulton [fol. 54] any question about either of these exhibits.

RAY HUMPHREYS, a witness for the People, testified as follows:

Direct examination:

I am the chief investigator for the district attorney's office. I arrested Charles H. Fulton and Betty Fulton on April 27.

"A. Well, we entered the house at 1030 East Amherst, and in the living room Mrs. Fulton attempted to stop me.

"Mr. Zarlengo: We object to that and ask it be stricken, as being improper, and the witness knows it.

"Mr. Hornbein: I will object to it on the ground, and enter it of record, that we made a motion for severance, and to which the district attorney assured the court there would not be any evidence of this kind; that would be binding on our client who was not there.

"Mr. Rice: If the court please, in regard to the motion for severance; at the time that was argued, I stated to the court there would not be any evidence admissible against one and not against the other, in this case. We [fol. 55] take the position the evidence now offered is admissible as against all defendants; their acts of conspiracy, and under the law of the case, is admissible as against all. And the statement of counsel, I said I would not offer any evidence of this nature; I challenge that statement.

"Mr. Zarlengo: We object to this answer.

"The Court: Objection sustained as to the answer.

"Q. Mr. Humphreys, will you state just what happened when you went into the house; what was said by you, and what was said or done by anybody else at that time?

"Mr. Hornbein: The defendant Wolf renews his objection.

"The Court: Objection overruled."

Mr. Humphreys identifies Exhibit "F" as ten $100 bills taken from Dr. Fulton the night of the arrest.

Mr. Humphreys also identifies Exhibits "G", "H", and "I", as slips of paper taken from Dr. Fulton's shirt pocket.

I saw a girl leave Fulton's house; she was Vera Bashor. [fol. 56] She left the house, got in her car, and drove east.

People's Exhibit "F" offered; offer objected to.

Objection overruled; exception saved.

Cross-examination.

By Mr. Dickerson:

It was a private house, but I walked in without a search warrant of any kind.

Betty Fulton had on a nurse's uniform; she didn't have on a nurse's cap.

Exhibits "E" and "F" are shown to the jury.

Eloise M. Gorman, a witness for the People, testified as follows:

I am acquainted with the defendant.

"The Court: The court has indicated she has that privilege, if she wants to she may claim it; that is as far as the court will state."

I went to Dr. Wolf's office and he gave me Dr. Fulton's address.

I went to Dr. Fulton's and paid him and had it.

Witness identified People's Exhibit "I" with her name on it.

[fol. 57] Witness identifies her name and address in People's Exhibit "E".

I never paid Dr. Wolf any money.

I paid Dr. Fulton $200.

I only saw Dr. Wolf and Dr. Fulton once.

Motion made to strike out witness's testimony on the ground that there was no showing that she was pregnant and no showing that she was ever aborted, and that this is not such a similar offense as would make the evidence admissible.

Motion denied.

Cross-examination.

By Mr. Hornbein:

I made no complaint to the district attorney's office against either Dr. Wolf or Dr. Fulton.

The district attorney sent for me; I didn't go voluntarily.

Mr. Humphreys told me that I could be prosecuted.

Cross-examination.

By Mr. Zarlengo:

Mrs. Fulton let me in to their private family residence. [fol. 58] I had no conversation with her at all. She wasn't present when I had any conversation with the doctor.

JULIANA ZURCHER, a witness for the People, testified as follows:

I know the defendants. I went to Dr. Fulton's office.

Objected to on the ground that the testimony would be inadmissible. Objective overruled; exceptions saved.

I went to Dr. Fulton's house to have an abortion. I paid him $150, and he gave me Dr. Wolf's phone number so that I might call if anything went wrong. I went to Dr. Wolf's office and told him that Dr. Fulton had sent me.

Dr. Wolf examined me, and I went out to Dr. Fulton's the next day.

I went back to Dr. Wolf's two or three days later and he told me that I was O. K.

Witness identifies People's Exhibit "H".

Counsel moves to strike witness's testimony; motion denied.

Cross-examination.

By Mr. Dickerson:

I signed a statement in the district attorney's office. [fol. 59] I was informed that I could be prosecuted, but that if I cooperated that most likely nothing would be done. I gathered this impression from Mr. Humphreys.

He used the word "cooperation". He told me that I had committed a crime and asked for my cooperation.

Mr. Malach showed me my statement this morning.

Cross-examination.

By Mr. Hornbein:

I did not go to the district attorney's office voluntarily. I objected to coming to the district attorney's office, and they said they would send the wagon out, so I said I would come down peacefully. I am not married.

I was in the district attorney's office for several hours. At first I refused to cooperate, but after two hours I told them my story.

Cross-examination.

By Mr. Zarlengo:

They threatened to bring me down in the patrol. Again I refused to talk for almost an hour. They told me that I was an accomplice and that I had committed a crime, but they led me to believe that if I cooperated I would not be prosecuted.

[fol. 60] Betty Fulton was not in the room when I talked with the doctor. She gave me nothing but a glass of water. I asked her for the water. She used no instruments and she wasn't present when the doctor was there.

Prudence Rockman, a witness for the People, testified as follows:

I know the defendants. I went to see Dr. Fulton. Counsel objects to the testimony of this witness on the same grounds as to the testimony of the previous witness.

I went to see Dr. Fulton to have an abortion performed. He examined me.

Counsel objects to asking the witness leading questions.

"The Court: The witness is reluctant.

"Mr. Zarlengo: Then I ask that this witness be advised of her right not to testify.

"Mr. Dickerson: She doesn't have to testify.

"Mr. Zarlengo: I ask she be advised and warned of her constitutional rights in the matter.

"Mr. Rice: The witness has already elected to testify.

[fol. 61] "Mr. Zarlengo: In view of the testimony we had here this morning, unless they should be warned—

"The Court: (interrupting) Objection overruled

"Mr. Zarlengo: Save an exception."

Dr. Wolf came to my home, gave me an examination and said that I was all right.

I saw Dr. Wolf again a week later in his office.

Witness identifies her name in Exhibit "E". People offer page of Exhibit "E" in evidence.

Counsel objects; objections overruled, exceptions saved.

Cross-examination.

By Mr. Dickerson:

I gave the district attorney a statement.

I was asked to come to court by Ray Humphreys.

Cross-examination.

By Mr. Zarlengo:

Betty Fulton let me in her home and told me to take my garments off.

Motion made to strike testimony of witness. Motion overruled; exceptions saved.

[fol. 62] Ray Humphreys recalled by the People.

Witness identifies Exhibits "A" and "B".

Exhibits "A" and "B" offered in evidence. Objections overruled and exceptions saved.

MARGARET L. ROGERS, a witness for the People, testified as follows:

I know the defendants. I met Dr. Fulton in his office.

I told him that I was pregnant, and we discussed what we were going to do. The following day he examined me in his office. He told me to come to his home at 6 that evening. He gave me Dr. Wolf's phone number and said that he would take care of me after I got home.

After I left Fulton's house I went home and went to bed. I called Dr. Wolf the next day. I told him that I was suffering. He left some medicine and said that he would return the next morning.

I never paid Dr. Wolf any money.

Witness identifies Exhibit "G" which bears her name and phone number.

Witness identifies Exhibit "E" upon which her name appears.

[fol. 63] Objection made to both exhibits. Objection overruled; exception saved.

Cross-examination.

By Mr. Hornbein:

I only saw Dr. Wolf on two occasions. He visited my home when I was sick and needed medical care. He gave me the medical care I needed. That is all I had to do with him.

I didn't voluntarily make a complaint against them. I was taken to the district attorney's office. I was questioned by Mr. Humphreys and two men. They said they wanted me to cooperate with the district attorney. I was scared and nervous.

Cross-examination.

By Mr. Zarlengo:

I only saw Mrs. Fulton in her home. She was not present when the doctor examined me.

I signed a statement in the district attorney's office that was prepared by their secretary. They told me to read it before I came on the stand.

BARBARA BLITZ, a witness for the People, testified as follows:

I know the defendants. I had a conversation with Dr. Wolf in the Republic Building. He examined me and said [fol. 64] that I was two months pregnant.

He told me that another doctor would perform the abortion for me. He told me to go to 1030 South Amherst Street, and I went that night.

Mrs. Fulton let me in her house. She put me on a table and left the room. Dr. Fulton came in. I paid him $200 and he gave me some pills, inserted something, and said that Dr. Wolf would see me at the West Hotel.

I saw Dr. Wolf at his office some two weeks later. At that time he said I was perfectly all right, and that there was no necessity to come back.

People's Exhibit "J" is identified as the registration card at the West Hotel.

Witness identifies her name in People's Exhibit "E". District attorney offers pages of Exhibit "E".

Counsel objects. Objection overruled, exceptions saved.

Cross-examination.

By Mr. Dickerson:

I am single and work for the Telephone Company. I was called to come to the district attorney's office by Mr. Humphreys. He informed me that I might be prosecuted. I signed a statement.

[fol. 65] I asked him what would come of all this and he said that he hoped nothing, but that I had been in on it, and that my abortion was a crime.

Cross-examination.

By Mr. Zarlengo:

The only time I saw Betty Fulton was in her home. Mrs. Fulton wasn't around there at that time. She had nothing to do with it. She wasn't present at any time that I was treated.

Cross-examination.

By Mr. Hornbein:

I saw Dr. Wolf three times. He gave me the medical attention that was needed. He didn't use any drugs or instruments.

Barton Murray, a witness for the People, testified as follows:

I am employed at the West Hotel as day clerk. I know Dr. Julius Wolf.

Witness identifies People's Exhibit "C" and "J".

Objection is made to the introduction of registration card. Objection overruled, exceptions saved.

I registered the two persons into the hotel myself.

[fol. 66] Mr. Humphreys asked me to come to the district attorney's office.

Exhibit "E" is shown to the jury. Identifies pages to the jury as have been identified by the witnesses.

People rest.

Motions for Directed Verdict and Denials Thereof

Motion in behalf of Betty Fulton for a directed verdict.

Motion denied. Exceptions saved.

Motion in behalf of Julius A. Wolf for a directed verdict.

Motion overruled; exceptions saved.

Motion in behalf of Dr. Charles H. Fulton for a directed verdict.

Motion overruled; exceptions saved.

Defendants rest.

Statement of the court to the jury.

"The Court: Gentlemen, during one of the recesses of the court, it was mentioned, in a statement by the witness Bashor; 'This was Betty Fulton on the telephone,' and it was stricken, and the court orders that stricken, and you are now instructed to disregard it.

[fol. 67] "The evidence having been completed gentlemen, you will kindly listen to the reading of the instructions:"

INSTRUCTIONS TO THE JURY

No. 1

Statement of the charge as is alleged in the information and to which the defendants entered a plea of not guilty, which are the issues to be tried.

No. 2

Information is a mere accusation.

No. 3

Stock instruction in re date.

No. 4

Stock instruction as to definition of a crime.

No. 5

Stock instruction on intent.

~~No. 6~~

Definition of a conspiracy.

No. 7

Definition of an abortion.

No. 8

Stock instruction on presumption of innocence.

No. 9

Stock instruction on burden of proof.

[fol. 68] No. 10

Stock instruction on reasonable doubt.

No. 11

Instruction that no formal agreement is necessary to establish or prove a conspiracy.

No. 12

The court instructs the jury, as a matter of law, that to constitute the crime of conspiracy it is not necessary that the conspirators should succeed in their design; it is enough if the common design was formed, in manner and form as charged in the information. If the conspiracy charged in the information has been proven to the satisfaction of the jury, beyond a reasonable doubt than the act of any one of the conspirators in furtherance of the common design, if proved, will be regarded as the act of the other.

No. 13

The court instructs the jury, as a matter of law, that all who take part in a conspiracy after it is formed, and while it is in execution, and aid in executing it, are fellow conspirators. They commit the offense when they become parties to the transaction, or further the original plan, with knowledge of the conspiracy.

No. 14

The court instructs the jury that it is incumbent upon the People to prove to your satisfaction, beyond a reasonable [fol. 69] doubt, that the crime charged in the information was committed in the City and County of Denver.

In that connection it is not necessary that the alleged conspiracy shall have originated in the City and County of Denver, or that all of the defendants participated in the conspiracy in the City and County of Denver, for if you find from the evidence, beyond a reasonable doubt, that the defendants, or any of them, did any act in the City and County of Denver which manifested an intention to commit the alleged conspiracy, that is sufficient.

No. 15

The jury is instructed that it is not incumbent upon the State to prove the alleged conspiracy by direct evidence. It may be established by circumstantial evidence or by evidence both direct and circumstantial.

In proving the agreement or conspiracy it is not necessary to prove the language in which it was made. The conspiracy may be shown, as stated above, by evidence more or less circumstantial in its character. It may be shown by what is said and done by each of the parties in the further-

ance of the common design, if any acts are done, or by what system or concert of action between them appears from their acts when viewed as a whole.

In determining whether or not the defendants entered [fol. 70] into a conspiracy to commit an unlawful act, to wit: a felony, which felony was procuring an abortion by wilfully, knowingly, unlawfully and feloniously administering and causing to be administered and taken, poisons and noxious and destructive substances and liquids, and using and causing to be used instruments in and upon the body of one Agnes Vera Bashor, the said Agnes Vera Bashor being then and there a woman with child, with the intent then and there to procure the miscarriage of the said Agnes Vera Bashor, you will consider, so far as shown by the evidence, all that was said and done by the defendants, whether or not they acted in concert for the accomplishment of a common purpose, what that common purpose was, if the same was shown, and from these facts and all the facts and circumstances shown by the evidence you must determine, beyond a reasonable doubt, whether the defendants entered into an agreement or conspiracy amongst themselves to commit the crime charged in the information.

No. 16

A common design and unlawful purpose by two or more persons is the essence of the charge of conspiracy, and this common design and unlawful purpose must be proved in order to warrant a conviction, either by direct evidence or by proof of such circumstances as naturally tend to prove it, and sufficient in themselves to satisfy the jury of the [fol. 71] existence of such common design beyond a reasonable doubt.

No. 17

Stock instruction that at least two persons must participate before a crime or conspiracy can be committed.

No. 18

The jury is instructed that although you believe from the evidence that one of the defendants committed an abortion on the witness Agnes Vera Bashor, that is not sufficient in itself to convict the defendants of conspiracy, unless you further believe from all the evidence, beyond a reasonable doubt, that said abortion was committed in pursuance and

in the furtherance of and as a part of a conspiracy as hereinbefore defined.

And if the evidence does not so convince you, you must acquit the defendant.

No. 19

There can be no conspiracy without at least two persons participating therein. If after a consideration of all the evidence in this case, there is a reasonable doubt as to the guilty of two of the defendants, it is your duty not only to acquit the defendants concerning whose guilt there is a reasonable doubt, but also to acquit the other defendant.

No. 20

While you may convict upon the uncorroborated testi-
[fol. 72] mony of Agnes Vera Bashor, still you should act upon her testimony with great caution, subjecting it to careful examination in the light of the other evidence in the case, and you are not to convict upon such testimony alone, unless clearly convinced after such careful examination of its truth. If not so convinced you cannot convict without such corroboration of the same as will satisfy you beyond a reasonable doubt, and in the absence of such corroboration your verdict should be not guilty.

Corroborating evidence means such evidence, either direct or by proof of surrounding facts and circumstances as tends to establish the participation of the defendants in the commission of the offense.

No. 21

What is meant by circumstantial evidence in criminal cases is the proof of facts and circumstances connected with or surrounding the commission of the crime charged; and if these facts and circumstances are sufficient to satisfy you of the guilt of the defendant beyond a reasonable doubt, such proof is sufficient to authorize a verdict of guilty.

Where a conviction is sought on circumstantial evidence alone the People must not only show beyond a reasonable doubt that the alleged facts and circumstances are true, [fol. 73] but the facts and circumstances must be such as are absolutely incompatible, upon any reasonable hypothesis, with the innocence of the defendants, and incapable of explanation upon any reasonable hypothesis other than that of the guilt of the defendants.

No. 22

Stock instruction on credibility of witnesses.

No. 23

There is some evidence with reference to another transaction than that charged in the information. This evidence is admissible only as bearing upon the question of whether or not the defendants had a plan or design to produce a result of which the act charged in the information was a part, and you can consider such evidence for no other purpose. The defendants cannot be tried for or convicted of any offense not charged in the information.

No. 24

The court instructs the jury: That while the statute of this state provides that a person charged with crime may testify in his own behalf, he is under no obligation to do so, and the statute expressly provides that his neglect or refusal to testify shall not create any presumption against him. And in this case, a failure of the defendants to testify should not be taken or considered by the jury as any evidence of their guilt or innocence.

[fol. 74] No. 25

The court instructs you that you have nothing whatever to do with the punishment to be administered in this cause in case of a conviction, and you will not consider it for any purpose; but it is your duty to try this case upon the law and the evidence, and upon that alone, and to render a true verdict thereon.

No. 26

Stock instruction on arguments and statements of counsel and that no one instruction contains all the law.

Counsel for defendants object to giving of instructions Nos. 12, 13, 14, 15, 16, 21, and 23, and except to the refusal of the Court to give defendants' tendered instructions Nos. 1 to 13, inclusive.

Counsel argues to the jury. District Attorney opens argument.

Mr. Zarlengo for defendant, Betty Fulton.

Mr. Hornbein for defendant, Julius A. Wolf.

Mr. Dickerson for defendant, Charles H. Fulton.
Mr. Anderson closing for the People.

EXCERPTS FROM MR. ANDERSON'S REMARKS

From Mr. Anderson's remarks:

[fol. 75] "Let me show you what would happen. You may as well say to the bunch, 'go ahead with your abortion business,' give them all licenses to commit abortions, because we have this situation, gentlemen, and I am reading the court's instruction number 24. Now remember the district attorney has filed on the doctor who performed the abortion and the lady who got it too; we are now trying these two people, but while the statute of this state provides a person who is charged with crime may testify in his own behalf; and that is also true of his or her own behalf; he is under no obligation to do so, and the statute expressly provides that his neglect or refusal to testify shall not create any presumption against him.

"All right, where is that evidence? What has happened to the state's evidence, where you file on both the doctor and the woman, and you bring them in and try them? How are you going to attack; how are you going to fasten anything against them? We can't force them to take the witness stand.

"Mr. Hornbein: We make the objection on the ground that is a violation of the instructions and the statute of the state, and is an indirect method, and directly, [fol. 76] of commenting on the fact the defendants did not take the stand.

"Mr. Anderson: Not at all your Honor.

"Mr. Hornbein: That is what our objection is; we didn't take the stand and explain to the jury, and he has no right under our law to comment on that.

"Mr. Dickerson: Your Honor, the last statement he made, was, they didn't take the stand, and I want the record to show he turned and pointed to the doctor; turned to the right, indicating their direction, and said 'we can't make them take the stand,' and he has no right, and we object.

"Mr. Zarlengo: And we make the same objection.

"Mr. Anderson: Let the record show previous to making this statement, my remarks were substantially

these: That we are now trying the doctor and the woman, and they have both been filed on for this offense, and this has reference to—(interrupted)

"The Court: Objection overruled.

"Mr. Dickerson: Exception.

"Mr. Zarlengo: Exception.

[fol. 77] "Mr. Anderson: Now, gentlemen, here is the situation where we find ourselves, and an unfortunate one we agree it is. But you are never going to enforce the abortion law, not in this jurisdiction you are not, if you do what counsel has suggested. It is a bad situation; nothing we can do about it, and there under instruction number 24 is the reason why.

"Mr. Hornbein: We object to that statement about that instruction, and we make the same objection——

"The Court: Objection overruled.

"Mr. Hornbein: May I make my objection?

"The Court: Yes.

"Mr. Hornbein: Referring to the statute of this state; that the district attorney may not comment on the fact the defendant does not take the stand. He is doing it, after we made our objection and doing it again.

"Mr. Dickerson: Let the record show our same objection; he is violating—(interrupted)

"Mr. Zarlengo: The same objection.

[fol. 78] "The Court: Objection overruled.

"Mr. Zarlengo: Save an exception.

"Mr. Anderson: Well, gentlemen, we are not going to dwell on that situation any longer, but just bear that in mind when you reconsider the remarks made by counsel in their arguments."

Verdicts

Jury finds defendant Julius A. Wolf guilty of conspiracy.

Jury finds defendant Charles H. Fulton guilty of conspiracy.

Jury finds defendant Betty Fulton guilty of conspiracy.

Defendants except to the entry of the verdict and are granted 20 days within which to file a motion for a new trial.

Defendants Tendered Instructions

No. 1

"Where circumstantial evidence is relied upon to secure a conviction in a criminal case, it is not sufficient that the circumstances proven coincide with or render probable the theory of guilt to warrant a conviction.

"To warrant a conviction the circumstances proven must exclude the existence of every reasonable hypo- [fol. 79] thesis, save and except the hypothesis of guilt. Otherwise, the defendants must be acquitted.

No. 2

"The jury is instructed that while it is not necessary that there be a formal agreement to constitute a conspiracy, yet it is necessary that there be wilful, conscious, corrupt and active participation in carrying out and furthering a common criminal design. The mere fact that a defendant may have had knowledge that his alleged co-conspirator was committing a crime and that a defendant acquiesced therein, is not sufficient to constitute a conspiracy.

No. 3

"If you believe from the evidence that Agnes Vera Bashor was pregnant, and if you believe that she suffered a miscarriage, and that such miscarriage was brought about by any drugs or poison or liquids administered to her by some one other than one of the defendants in this case, or if you believe that such miscarriage was brought about by any other act on the part of anyone other than one of the defendants in this case, or if from the evidence upon this question you have a reasonable doubt as defined in these instructions, then your verdict should be not guilty.

No. 4

"The jury is instructed that while it is not necessary that there be a formal agreement to constitute [fol. 80] a conspiracy, yet it is necessary that there be wilful, conscious, corrupt and active participation in carrying out and furthering a common criminal de-

sign. The mere fact that a defendant may have had knowledge that his alleged co-conspirator was committing a crime and that a defendant acquiesced therein, is not sufficient to constitute a conspiracy."

No. 5

"The defendants are on trial for a conspiracy to commit an abortion on Agnes Vera Bashor. That is the information that has been read to you, and the defendants cannot be convicted of any other crime. Evidence has been admitted to show similar offenses, but this evidence can be consideged by you only for the purpose of corroboration, and although you may believe that other crimes were committed, yet the defendants cannot be convicted unless you are satisfied beyond a reasonable doubt that the particular and specific crime charged, namely, conspiracy to commit an abortion on Agnes Vera Bashor, is proven beyond all reasonable doubt.

No. 6

"The jury is instructed that the defendant Wolf is a duly licensed and practicing physician. That it is his right and privilege to treat persons requiring medical attention no matter who they are, or regardless of what their ailment might be. And the fact, if it be a fact, that the defendant Wolf treated patients [fol. 81] who had theretofore had an abortion committed, is not sufficient to make him a conspirator.

No. 7

"The jury is instructed that although you believe from the evidence that one of the defendants committed an abortion on the witness Agnes Vera Bashor, that is not sufficient in itself to convict the defendants of conspiracy, unless you further believe from all the evidence, beyond a reasonable doubt, that said abortion was committed in pursuance and in furtherance of and as a part of a conspiracy as hereinbefore defined.

"And if the evidence does not so convince you, you must acquit the defendants.

No. 8

"The jury is instructed that the examination of the prosecuting witness for pregnancy by Dr. Wolf, does not make him a co-conspirator with the defendants Fulton, although he may have known at the time he examined the prosecuting witness that it was her purpose to procure an abortion.

No. 9

"If after a consideration of all the evidence there is a reasonable doubt in your minds as to whether the defendant Wolf knowingly, unlawfully, wilfully and feloniously, and in the furtherance of a common design to abort the prosecuting witness, participated therein, [fol. 82] the defendants should be acquitted.

No. 10

"If after a consideration of all the evidence there is a reasonable doubt in your minds as to whether the defendant Betty Fulton knowingly, unlawfully, wilfully and feloniously, and in the furtherance of a common design to abort the prosecuting witness, participated therein, she should be acquitted.

No. 11

"The court instructs the jury that it is incumbent upon the People to prove to your satisfaction, beyond a reasonable doubt, that the crime charged in the information was committed in the City and County of Denver.

"If you believe from the evidence that the offense alleged in the information was committed in the County of Arapahoe, or if after consideration of all the evidence there is a reasonable doubt in your minds as to whether the offense was committed in the City and County of Denver or in the County of Arapahoe, you shall find the defendants not guilty.

No. 12

"You are instructed that to warrant a conviction upon circumstantial evidence the facts and circumstances proven must be such as are consistent only

with the guilt of the party or parties charged, and such [fol. 83] as cannot be consistent with any other reasonable hypothesis other than that of guilt.

"If any single material fact is proved by the evidence to the satisfaction of the jury which is inconsistent with the defendant's guilt, it is your duty to find the defendant or defendants not guilty.

No. 13

"The court instructs the jury that a duly licensed physician and surgeon may lawfully examine a patient for the purpose of ascertaining whether she is pregnant, and it is also lawful and right to attend her when in pain, when suffering from any cause whatsoever."

DEFENDANT WOLF'S MOTION FOR A NEW TRIAL, OMITTING THE FORMAL PARTS

"Comes now the defendant, Julius A. Wolf, and moves this Honorable Court for a new trial, and to set aside the verdict heretofore rendered, and as grounds for this Motion, shows unto the court:

"1. That the court erred in overruling the Motion of the defendant, Julius A. Wolf, to suppress as evidence a 1944 Day Book taken from the possession of the defendant, which book contained the names of patients and the nature of their ailment, and other matters which were of a wholly private and confidential nature. Said book being marked as an exhibit in this case. For the reasons that said book was taken without a search [fol. 84] warrant or any other process of law, and in violation of the rights of this defendant under Article 2, Section 7, and Section 18 of the Constitution of the State of Colorado and the 4th Amendment of the Constitution of the United States.

"2. The court erred in overruling the objection of the defendant, Julius A. Wolf, to the introduction of said exhibit for the further reason that the admission in evidence of said exhibit violated the statutes of the State of Colorado, which prohibits a doctor from testifying as to privileged communications received by him from his patients, which statements were given to

assist the physician in his treatment and diagnosis, and said exhibit contained the ailments from which patients were suffering and its introduction in evidence was, therefore, violative of the statute in such case made and provided.

"3. The court erred in overruling the objection of the defendant, Julius A. Wolf, to the introduction of said book, on the ground that it was unlawfully obtained by the officers of the District Attorney's office in violation of Article 2, Section 7, and Article 2, Section 18 of the Constitution of the State of Colorado, and in violation of the 4th Amendment to the Constitution of the United States.

"4. The court erred in restricting the cross examination of the People's witness, Agnes Vera Bashor, and [fol. 85] in not permitting the defendant to impeach her by showing that she made contrary statements in a deposition given by her in this case in open court on June 30, 1944.

"5. The court erred in not permitting the defendant to interrogate the witness, Agnes Vera Bashor, as to statements she had theretofore made in a sworn deposition, and in not permitting the defendant to read said deposition to the said witness, or any part thereof, for the reason that the witness made inconsistent statements in said deposition with her testimony taken at the trial.

"6. The court erred in denying the defendant the right to prove that the witness, Agnes Vera Bashor, did make statements in her deposition contrary to the statements made in open court in many particulars, all of which were presented to the court by formal offers of proof. That said formal offers of proof made to the court set forth the questions propounded to and the answers given by the witness, Agnes Vera Bashor, in her deposition. From said questions and answers it appears that her testimony at the trial was at variance and inconsistent with her testimony in the deposition.

"7. The court erred in overruling the objection of the defendant to the testimony of the witnesses; Prudence Rockman, Eloise M. Gorman, Barbara Blitz, Margaret [fol. 86] L. Rogers, and Juliana Zurcher, for the reason that said testimony related to matters and occurrences

that were wholly unrelated and independent of the matters charged in the information in this case, and that such testimony was not admissible on the theory of similar offenses because it had no bearing whatsoever on the issue in this case.

"8. The court erred in overruling the Motion of the defendant, Julius A. Wolf, made at the conclusion of the State's case for a directed verdict of 'not guilty' for the reason that the evidence affirmatively showed that the defendant did nothing except that which was lawful for him to do in accordance with the practice of his profession, and that the evidence was wholly insufficient to establish any conspiracy to which the defendant was a party, and the court further erred in overruling the Motion of the defendant, Julius A. Wolf, made at the conclusion of all the testimony for a directed verdict of 'not guilty' for the same reason.

"9. The court erred in giving instruction No. 13 and particularly the last sentence thereof, which is as follows: 'They commit the offense when they become parties to the transaction, or further the original plan, with knowledge of the conspiracy.' For the reason that said statement is ambiguous, misleading, and improper, in that one may be a party to a transaction and not be a [fol. 87] conspirator. To make one a conspirator, it is not only necessary that he be a party to the transaction, but that he actively and corruptly aid in the execution thereof.

"10. The court erred in giving instruction No. 15 for the reason that the same is argumentative and is in the nature of advocacy, and that it is repetitious and unduly emphasizes the State's theory of the case.

"11. The court erred in giving instruction No. 16 in that it ignores the rule as to circumstantial evidence namely that the circumstances proved must not only be consistent with the theory of guilt but must exclude every other reasonable hypothesis except the theory of guilt.

"12. The court erred in giving instruction No. 23 because it is inapplicable to the facts in this case in that said instruction is unintelligible, for the reason that the evidence referred to matters wholly distinct and independent of the matters charged in this case, and the

acts charged in the information could not possibly be a part of any result, and it is impossible to ascertain the meaning of the language as to whether or not the defendant had a plan or design to produce a result of which the act charged in the information was a part: That the act charged in the information was not a substantive or objective offense, and the only result of the [fol. 88] act charged in the information had to do with the case of Agnes Vera Bashor and no other person.

"13. The court erred in refusing to give defendant's tendered instructions Nos. 1 to 13, inclusive.

"14. The court erred in overruling the objection of the defendant as to certain remarks made by the District Attorney in his closing argument to the jury, in which the District Attorney commented upon the failure of the defendant to take the stand in his own defense. Said remarks being as follows;

> " 'All right, where is that evidence; what has happened to the state's evidence, where you file on both the doctor and the woman, and you bring them in and try them? How are you going to attack; how are you going to fasten anything against them? We can't force them to take the witness stand.'

And again,

> " 'Now, gentlemen, here is the situation where we find ourselves, and an unfortunate one we agree it is. But you are never going to enforce the abortion law, not in this jurisdiction you are not, if you do what counsel has suggested. It is a bad situation; *nothing we can do about it, and there under instruction number 24 is the reason why!*'

[fol. 89] For the reason that said argument of the District Attorney was a comment on the failure of the defendant to testify in direct violation of the statute that no presumption should be drawn against the defendant because of his failure to testify.

"15. The court erred in overruling the defendant's Motion for Severance for the reason that it appeared at the trial that the District Attorney offered evidence that would not have been admissible against the defend-

ant Wolf had he been tried alone, but was admissible because he was tried jointly with the other defendants.

Motion for a New Trial Filed on Behalf of Defendants Charles H. Fulton and Betty Fulton, Omitting the Formal Parts

"Comes now the defendants, Charles H. Fulton and Betty Fulton, and move this Honorable Court for a new trial, and that this Honorable Court set aside the verdict herein rendered, and as grounds therefore shows unto this court:

"1. That the court erred in permitting in evidence one, certain, so-called Day Book alleged to have been taken from the possession of Julius A. Wolf, a co-defendant herein; that said book was inadmissible against these defendants if tried alone; and that heretofore these defendants filed their motions for severance [fol. 90] which, had the court granted the same, would have made said Day Book inadmissible as to them, and that, therefore, said book was inadmissible and the court should not have permitted the same to be produced in evidence against these defendants.

"2. That said book was taken without the knowledge of these defendants and was in no wise connected with them and was, if anything, a mere statement written by a third person without the knowledge of these defendants, and these defendants were in no wise connected with the same in any manner.

"3. That the court erred in refusing counsel for these defendants permission to cross examine the witness, Agnes Vera Bashor, concerning statements conflicting with her sworn testimony, and in not permitting these defendants to impeach her by showing that she made statements that were entirely contrary and opposite in a deposition given by her on demand of the District Attorney in this case in Open Court on June 30, 1944.

"4. That the court erred in not permitting these defendants to interrogate the witness, Agnes Vera Bashor, regarding her sworn statements therefore made in a deposition in this case; and that the court erred in not permitting the defendants to read from

said deposition to said witness, or any part of it, for [fol. 91] the reason that the witness swore opposite to and inconsistent with her sworn statements in her said deposition taken before the trial on June 30, 1944.

"5. That the court erred in refusing these defendants the right to prove that the witness, Agnes Vera Bashor, swore to alleged facts in her deposition which were contrary to her sworn statements made in Open Court in many particulars, all of which were presented to the court during the trial by formal offers of proof; that the said formal offers of proof made to the court set forth the questions propounded to and answers given by the witness, Agnes Vera Bashor, in her deposition, and from the said questions and answers given by her in the deposition, it appears that her testimony at the trial conflicted with it, was at variance with it, was vitally inconsistent with it, and that either she swore falsely at the time of her deposition or during the trial.

"6. That the court erred in overruling the objection of the defendants to the testimony of the witnesses, Prudence Rockman, Eloise M. Gorman, Barbara Blitz, Margaret L. Rogers, and Juliana Zurcher, for the reason that said testimony related to matters and occurrences that were wholly unrelated and independent of the matters charged in the information in this case, and that such testimony was not admissible on [fol. 92] the theory of similar offenses because it had no bearing whatsoever on the issue in this case.

"7. That the court erred in overruling the motion of these defendants made at the conclusion of State's case, for a directed verdict of 'not guilty' for the reason that no conspiracy was ever shown, and that the offense, if any, which was shown by the evidence would tend to prove an abortion committed in another jurisdiction.

"8. That the court erred in giving instruction No. 13, for the reason that it is tantamount to an instruction of guilt and tended to confuse the jury and to represent to the jury that the offense was assumed to have been committed by the court; and for the further reason that it erroneously makes one a conspirator if he has anything to do with a transaction.

"9. That the court erred in giving instruction No. 15 for the reason that the same is argumentative and is in

the nature of advocacy, and that it is repetitious and unduly emphasizes the State's theory of the case.

"10. That the court erred in giving instruction No. 16 in that it ignores the rule as to circumstantial evidence, namely, that the circumstances proved must not only be consistent with the theory of guilt, but must exclude every other reasonable hypothesis except the theory of guilt.

[fol. 93] "11. That the court erred in giving instruction No. 23 because it is inapplicable to the facts in this case, in that said instruction is unintelligible, for the reason that the evidence referred to matters wholly distinct and independent of the matters charged in this case, and the acts charged in the information could not possibly be a part of any result, and it is impossible to ascertain the meaning of the language as to whether or not the defendants had a plan or design to produce a result of which the act charged in the information was a part. That the act charged in the information was not a substantive or objective offense, and the only result of the act charged in the information had to do with the case of Agnes Vera Bashor and no other person.

"12. The court erred in refusing to give defendants' tendered instructions Nos. 1 to 13, inclusive.

"13. That the court erred in permitting the District Attorney to refer to the defendant, Betty Fulton, as follows: 'Look at her, isn't she cute? Yes, she is cute all right.'

"14. That the court erred in overruling the objections of the defendants to the remarks of the District Attorney in his closing argument to the jury in which the District Attorney directly commented on the failure of these defendants to take the stand in their own de-[fol. 94] fense, and turned and pointed to them and told the jury that he could not make them take the stand, and again told the jury, 'And there, under instruction No. 24, is the reason why we can do nothing about it.'

"15. That the argument of the District Attorney positively, directly and prejudicially was on the failure of the defendants to testify, and by his actions the District Attorney violated the statute and endeavored to take away the presumption of innocence, and en-

deavored to take away that statute that provides that no presumption shall be drawn against a defendant because of his failure to testify.

"16. That the court erred in overruling the motion of the defendants for severance for the reason that at the trial of the District Attorney offered evidence inadmissible as to these defendants if tried alone and offered evidence which was only admissible because they were tried jointly with the defendant, Julius A. Wolf."

Affidavit of S. T. Anderson, Assistant District Attorney.

Affidavit of William L. Rice, Chief Deputy District Attorney.

Affidavit of Philip Hornbein, attorney for defendant, Julius A. Wolf.

[fol. 95] Motion to strike affidavits of S. T. Anderson and William L. Rice, filed by F. E. Dickerson.

Motion to strike affidavits of S. T. Anderson and William L. Rice, filed by Anthony F. Zarlengo.

Affidavit of F. E. Dickerson.

Affidavit of Anthony F. Zarlengo.

Affidavit of S. T. Anderson.

Affidavit of Harry L. Moore, one of the jurors.

Affidavit of Louis D. Turrentine, one of the jurors.

Certificate of Court Reporter.

Order of Court that the last paragraph of the affidavit of the District Attorney be stricken; District Attorney excepts.

ORDER OVERRULING MOTION FOR NEW TRIAL

Court overrules Motion for a New Trial. Defendants granted a 60-day stay of execution and 60 days within which to tender a bill of exceptions.

Exhibit A attached.

Exhibit B attached.

Exhibit C attached.

Photostatic pages of Exhibit E attached. (The original [fol. 96] book being Exhibit C in case No. 15666 in the Supreme Court entitled Julius A. Wolf and A. H. Montgomery, plaintiffs in error v. The People of the State of Colorado, defendants in error, reference to which is made for greater certainty.)

Exhibit G attached.

Exhibit H attached.
Exhibit I attached.
Exhibit J attached.

Certificate of trial judge signed August 23, 1945.

SENTENCES

Sentence of Julius A. Wolf to not less than 15 months or more than 5 years in the State Penitentiary.

Sentence of Charles H. Fulton to not less than 15 months or more than 5 years in the State Penitentiary.

Sentence of Betty Fulton to not less than 1 year or more than 2 years in the State Penitentiary.

Formal motion for a new trial denied.

Stay of execution of 60 days and 60 days to tender a bill of exceptions.

Additional stay of execution for 60 days and additional time for preparing bill of exceptions.

Formal order permitting substitution of photostatic copies.

[fol. 97] Additional stay of execution and time.

Additional stay of execution and time.

Stay of execution and time to September 4, 1945.

Certificate of Clerk of the District Court signed August 23, 1945.

Certificate of trial judge signed August 27, 1945.

ASSIGNMENTS OF ERROR OF JULIUS A. WOLF

Assignments of error, omitting the formal parts, is as follows:

Comes now Julius A. Wolf, one of the above named plaintiffs in error, and respectfully represents to this Honorable Court that at the trial and in the proceedings in the Court below there were manifest and material errors to the prejudice of this plaintiff in error, a specification of said errors being as follows:

1. That the court erred in overruling the motion of the defendant, Julius A. Wolf, to suppress as evidence a 1944 Day Book taken from the possession of the defendant, which

book contained the names of patients and the nature of their ailment, and other matters which were of a wholly private and confidential nature. Said book being marked as Exhibit E in this case. For the reason that said book was taken without a search warrant or any other process of law, [fol. 98] and in violation of the rights of this defendant under Article 2, Section 7, and Section 18 of the Constitution of the State of Colorado and the 4th Amendment of the Constitution of the United States.

2. The Court erred in overruling the objections of the defendant, Julius A. Wolf, to the introduction of said exhibit for the further reason that the admission in evidence of said exhibit violated the statutes of the State of Colorado, which prohibits a doctor from testifying as to privileged communications received by him from his patients, which statements were given to assist the physician in his treatment and diagnosis, and said exhibit contained the ailments from which patients were suffering and its introduction in evidence was, therefore, violative of the statute in such case made and provided.

3. The Court erred in overruling the objections of the defendant, Julius A. Wolf, to the introduction of said book, on the ground that it was unlawfully obtained by the officers of the District Attorneys' office in violation of Article 2, Section 7, and Article 2, Section 18, of the Constitution of the State of Colorado, and in violation of the 4th Amendment to the Constitution of the United States.

4. The Court erred in restricting the cross examination of the People's witness, Agnes Vera Bashor, and in not permitting the defendant to impeach her by showing that she made contrary statements in a deposition given by her in this case in open court on June 30, 1944.

5. The Court erred in not permitting the defendant to [fol. 99] interrogate the witness, Agnes Vera Bashor, as to statements she had theretofore made in a sworn deposition, and in not permitting the defendant to read said deposition to the said witness, or any part thereof, for the reason that the witness made inconsistent statements in said deposition with her testimony taken at the trial.

6. The Court erred in denying the defendant the right to prove that the witness, Agnes Vera Bashor, did make statements in her deposition contrary to the statements made in open court in many particulars, all of which were presented

to the Court by formal offers of proof. That said formal offers of proof made to the Court set forth the questions propounded to and the answers given by the witness, Agnes Vera Bashor, in her deposition. From said questions and answers it appears that her testimony at the trial was at variance and inconsistent with her testimony in the deposition.

7. The Court erred in overruling the objection of the defendant to the testimony of the witnesses, Prudence Rockman, Eloise M. Gorman, Barbara Blitz, Margaret L. Rogers, and Juliana Zurcher, for the reason that said testimony related to matters and occurrences that were wholly unrelated and independent of the matters charged in the information in this case, and that such testimony was not admissible on the theory of similar offenses because it had no bearing whatsoever on the issue in this case.

8. The Court erred in overruling the motion of the defendant, Julius A. Wolf, made at the conclusion of the State's case, for a directed verdict of "not guilty," for the [fol. 100] reason that the evidence affirmatively showed that the defendant did nothing except that which was lawful for him to do in accordance with the practice of his profession, and that the evidence was wholly insufficient to establish any conspiracy to which the defendant was a party, and the Court further erred in overruling the motion of the defendant, Julius A. Wolf, made at the conclusion of all the testimony, for a directed verdict of "not guilty" for the same reason.

9. The Court erred in giving instruction No. 13 and particularly the last sentence thereof, which is as follows: "They commit the offense when they become parties to the transaction, or further original plan, with knowledge of the conspiracy." For the reason that said statement is ambiguous, misleading, and improper, in that one may be a party to a transaction and not be a conspirator. To make one a conspirator, it is not only necessary that he be a party to the transaction, but that he actively and corruptly aid in the execution thereof.

10. The Court erred in giving instruction No. 15 for the reason that the same is argumentative and is in the nature of advocacy, and that it is repetitious and unduly emphasizes the State's theory of the case.

11. The Court erred in giving instruction No. 16 in that it ignores the rule as to circumstantial evidence, namely, that the circumstances proved must not only be consistent with the theory of guilt, but must exclude every other reasonable hypothesis except the theory of guilt.

[fol. 101] 12. The Court erred in giving instruction No. 23 because it is inapplicable to the facts in this case, in that said instruction is unintelligible, for the reason that the evidence referred to matters wholly distinct and independent of the matters charged in this case, and the acts charged in the information could not possibly be a part of any result, and it is impossible to ascertain the meaning of the language as to whether or not the defendant had a plan or design to produce a result of which the act charged in the information was a part. That the act charged in the information was not a substantive of objective offense, and the only result of the act charged in the information had to do with the case of Agnes Vera Bashor and no other person.

13. The Court erred in overruling the objection of the defendant as to certain remarks made by the District Attorney in his closing argument to the jury, in which the District Attorney commented upon the failure of the defendant to take the stand in his own defense. Said remarks being as follows:

> "All right, where is that evidence; what has happened to the State's evidence, where you file on both the doctor and the woman, and you bring them in and try them? How are you going to attack; how are you going to fasten anything against them? We can't force them to take the witness stand."

And again,

> "Now, gentlemen, here is the situation where we find ourselves, and an unfortunate one we agree it is. But [fol. 102] you are never going to enforce the abortion law, not in this jurisdiction you are not, if you do what counsel has suggested. It is a bad situation; *nothing we can do about it, and there under instruction number 24 is the reason why.*

For the reason that said argument of the District Attorney was a comment on the failure of the defendant to testify in direct violation of the statute that no presumption should

be drawn against the defendant because of his failure to testify.

15. The Court erred in overruling the defendant's Motion for Severance for the reason that it appeared at the trial that the District Attorney offered evidence that would not have been admissible against the defendant Wolf had he been tried alone, but was admissible because he was tried jointly with the other defendants.

16. That as to the refusal to give said tendered instructions the defendant, Julius A. Wolf, duly saved his exceptions, and he further saved his exceptions to the instructions hereinabove challenged. The defendant saved his exceptions to such of his objections as were overruled.

17. The verdict of the jury is against the law and the evidence, and the evidence is insufficient to sustain any verdict or judgment save and except a verdict of not guilty.

[fol. 103] ASSIGNMENTS OF ERROR OF BETTY FULTON

Assignments of error, omitting the formal parts, is as follows:

Comes now Betty Fulton, one of the above-named plaintiffs, in error, and respectfully represents to this Honorable Court that at the trial and in the proceedings in the Court below there were manifest and material errors to the prejudice of this plaintiff in error, a specification of said errors being as follows:

1. That the Court erred in permitting in evidence one, certain, so-called Day Book alleged to have been taken from the possession of Julius A. Wolf, co-defendant herein; that said book was inadmissible against this defendant if tried alone; and that heretofore this defendant filed her motion for severance which, had the Court granted the same, would have made said Day Book inadmissible as to her, and that, therefore, said book was inadmissible and the Court should not have permitted the same to be produced in evidence against this defendant.

2. That said book was without the knowledge of this defendant and was in no wise connected with her and was, if anything, a mere statement written by a third person without the knowledge of this defendant, and this defendant was in no wise connected with the same in any manner.

3. That the Court erred in refusing counsel for this defendant permission to cross examine the witness, Agnes [fol. 104] Vera Bashor, concerning statements conflicting with her sworn testimony, and in not permitting this defendant to impeach her by showing that she made statements that were entirely contrary and opposite in a deposition given by her on demand of the District Attorney in this case in Open Court on June 30, 1944.

4. That the Court erred in not permitting this defendant to interrogate the witness, Agnes Vera Bashor, regarding her sworn statements theretofore made in a deposition in this case; and that the Court erred in not permitting the defendant to read from said deposition to said witness, or any part of it, for the reason that the witness swore opposite to and inconsistent with her sworn statements in her said deposition taken before the trial on June 30, 1944.

5. That the Court erred in refusing this defendant the right to prove that the witness, Agnes Vera Bashor, swore to alleged facts in her deposition which were contrary to her sworn statements made in Open Court in many particulars, all of which were presented to the Court during the trial by formal offers of proof; that the said formal offers of proof made to the Court set forth the questions propounded to and answers given by the witness, Agnes Vera Bashor, in her deposition, and from the said questions and answers given by her in the deposition, it appears that her testimony at the trial conflicted with it, was at variance with it, was vitally inconsistent with it, and that either she swore falsely at the time of her deposition or during the trial.

[fol. 105] 6. That the Court erred in overruling the objection of the defendant to the testimony of witnesses Prudence Rockman, Eloise M. Gorman, Barbara Blitz, Margaret L. Rogers, and Juliana Zurcher, for the reason that said testimony related to matters and occurrences that were wholly unrelated and independent of the matters charged in the information in this case, and that such testimony was not admissible on the theory of similar offenses because it had no bearing whatsoever on the issue in this case.

7. That the Court erred in overruling the motion of this defendant made at the conclusion of the State's case for a directed verdict of "not guilty" for the reason that no conspiracy was ever shown, and that the offense, if any, which

was shown by the evidence would tend to prove an abortion committed in another jurisdiction.

8. That the Court erred in giving instruction No. 13, for the reason that it is tantamount to an instruction of guilt and tended to confuse the jury and to represent to the jury that the offense was assumed to have been committed by the Court; and for the further reason that it erroneously makes one a conspirator if he has anything to do with a transaction.

9. That the Court erred in giving instruction No. 15 for the reason that the same is argumentative and is in the nature of advocacy, and that it is repetitious and unduly emphasizes the State's theory of the case.

[fol. 106] 10. That the Court erred in giving instruction No. 16 in that it ignores the rule as to circumstantial evidence, namely, that the circumstances proved must not only be consistent with the theory of guilt, but must exclude every other reasonable hypothesis except the theory of guilt.

11. That the Court erred in giving instruction No. 23 because it is inapplicable to the facts in this case, in that said instruction is unintelligible, for the reason that the evidence referred to matters wholly distinct and independent of the matters charged in this case, and the acts charged in the information could not possibly be a part of any result, and it is impossible to ascertain the meaning of the language as to whether or not the defendant had a plan or design to produce a result of which the act charged in the information was a part. That the act charged in the information was not a substantive or objective offense, and the only result of the act charged in the information had to do with the case of Agnes Vera Bashor and no other person.

12. The Court erred in refusing to give defendant's tendered instructions Nos. 1 to 13, inclusive.

13. That the Court erred in permitting the District Attorney to refer to the defendant, Betty Fulton, as follows: "Look at her, isn't she cute? Yes, she is cute all right."

14. That the Court erred in overruling the objection of the defendant to the remarks of the District Attorney in his closing argument to the jury in which the District At-
[fol. 107] torney directly commented on the failure of this defendant to take the stand in her own defense, and turned and pointed to her and told the jury that he could not make

her take the stand, and again told the jury, "And there, under instruction No. 24, is the reason why we can do nothing about it."

15. That the argument of the District Attorney positively, directly, and prejudicially was on the failure of the defendant to testify, and by his actions the District Attorney violated the statute and endeavored to take away the presumption of innocence, and endeavored to take away that statute that provides that no presumption shall be drawn against a defendant because of his failure to testify.

16. That the Court erred in overruling the motion of the defendant for severance for the reason that at the trial the District Attorney offered evidence inadmissible as to this defendant if tried alone and offered evidence which was only admissible because she was tried jointly with the defendants, Charles H. Fulton and Julius A. Wolf.

17. That as to the refusal to give said tendered instructions the defendant, Betty Fulton, duly saved her exceptions, and she furtner saved her exceptions to the instruction hereinabove challenged. The defendant saved her exceptions to such of her objections as were overruled.

18. The verdict of the jury is against the law and the evidence, and the evidence is insufficient to sustain any verdict [fol. 108] or judgment save and except a verdict of not guilty.

Assignments of Error of Charles H. Fulton

Assignments of error, omitting the formal parts, is as follows:

Comes now Charles H. Fulton, one of the above-named plaintiffs in error, and respectfully represents to this Honorable Court that at the trial and in the proceedings in the Court below there were manifest and material errors to the prejudice of this plaintiff in error, a specification of said errors being as follows:

1. That the Court erred in permitting in evidence one certain, so-called Day Book alleged to have been taken from the possession of Julius A. Wolf, a co-defendant herein; that said book was inadmissible against this defendant if tried alone; and that heretofore this defendant filed his motion

for severance which, had the Court granted the same, would have made this Day Book inadmissible as to him, and that, therefore, said book was inadmissible and the Court should not have permitted the same to be produced in evidence against this defendant.

2. That said book was without the knowledge of this defendant and was in no wise connected with him or was, if anything, a mere statement written by a third person without the knowledge of this defendant, and this defendant was in no wise connected with the same in any manner.

[fol. 109] 3. That the Court erred in refusing counsel for this defendant permission to cross examine the witness Agnes Vera Bashor, concerning statements conflicting with her sworn testimony; and in not permitting this defendant to impeach her by showing that she made statements that were entirely contrary and opposite in a deposition given by her on demand of the District Attorney in this case in Open Court on June 30, 1944.

4. That the Court erred in not permitting this defendant to interrogate the witness, Agnes Vera Bashor, regarding her sworn statements theretofore made in a deposition in this case; and that the Court erred in not permitting the defendant to read from said deposition to said witness, or any part of it, for the reason that the witness swore opposite to and inconsistent with her sworn statements in her said deposition taken before the trial on June 30, 1944.

5. That the Court erred in refusing this defendant the right to prove that the witness, Agnes Vera Bashor, swore to alleged facts in her deposition which were contrary to her sworn statements made in Open Court in many particulars, all of which were presented to the Court during the trial by formal offers of proof; that the said formal offers of proof made to the Court set forth the questions propounded to and answers given by the witness, Agnes Vera Bashor, in her deposition, and from the said questions and answers given by her in the deposition, it appears that her testimony at the trial conflicted with it, was at variance with it, was vitally inconsistent with it, and that either she swore falsely at the time of her deposition or during the trial.

[fol. 110] 6. That the Court erred in overruling the objection of the defendant to the testimony of witnesses Prudence Rockman, Eloise M. Gorman, Barbara Blitz, Margaret L. Rogers, and Juliana Zurcher, for the reason that

said testimony related to matters and occurrences that were wholly unrelated and independent of the matters charged in the information in this case, and that such testimony was not admissible on the theory of similar offenses because it had no bearing whatsoever on the issue in this case.

7. That the Court erred in overruling the motion of this defendant made at the conclusion of the State's case for a directed verdict of "not guilty" for the reason that no conspiracy was ever shown, and that the offense, if any, which was shown by the evidence would tend to prove an abortion committed in another jurisdiction.

8. That the Court erred in giving instruction No. 13, for the reason that it is tantamount to an instruction of guilt and tended to confuse the jury and to represent to the jury that the offense was assumed to have been committed by the Court; and for the further reason that it erroneously makes one a conspirator if he has anything to do with a transaction.

9. That the Court erred in giving instruction No. 15 for the reason that the same is argumentative and is in the nature of advocacy, and that it is repetitious and unduly emphasizes the State's theory of the case.

10. That the Court erred in giving instruction No. 16 in that it ignores the rule as to circumstantial evidence, [fol. 111] namely, that the circumstances proved must not only be consistent with the theory of guilt, but must exclude every other reasonable hypothesis except the theory of guilt.

11. That the Court erred in giving instruction No. 23 because it is inapplicable to the facts in this case, in that said instruction is unintelligible, for the reason that the evidence referred to matters wholly distinct and independent of the matters charged in this case, and the acts charged in the information could not possibly be a part of any result, and it is impossible to ascertain the meaning of the language as to whether or not the defendant had a plan or design to produce a result of which the act charged in the information was a part. That the act charged in the information was not a substantive or objective offense, and the only result of the act charged in the information had to do with the case of Agnes Vera Bashor and no other person.

12. The Court erred in refusing to give defendant's tendered instructions Nos. 1 to 13, inclusive.

13. That the Court erred in overruling the objection of the defendant to the remarks of the District Attorney in his closing argument to the jury in which the District Attorney directly commented on the failure of this defendant to take the stand in his own defense, and turned and pointed to him and told the jury that he could not make him take the stand, and again told the jury, "And there, under instruction No. 24, is the reason why we can do nothing about it."

14. That the argument of the District Attorney positively, directly, and prejudicially was on the failure of the defendant to testify, and by his actions the District Attorney [fol. 112] violated the statute and endeavored to take away the presumption of innocence, and endeavored to take away that statute that provides that no presumption shall be drawn against a defendant because of his failure to testify.

15. That the Court erred in overruling the motion of the defendant for severance for the reason that at the trial the District Attorney offered evidence inadmissible as to this defendant if tried alone and offered evidence which was only admissible because he was tried jointly with the defendants, Betty Fulton and Julius A. Wolf.

16. That as to the refusal to give said tendered instructions the defendant, Charles H. Fulton, duly saved his exceptions, and he further saved his exceptions to the instructions hereinabove challenged. The defendant saved his exceptions to such of his objections as were overruled.

17. The verdict of the jury is against the law and the evidence, and the evidence is insufficient to sustain any verdict or judgment save and except a verdict of not guilty.

Respectfully submitted, Philip Hornbein, Donald M. Shere, F. E. Dickerson, A. F. Zarlengo, William F. Dwyer, Attorneys for Plaintiffs in Error, Symes Building, Denver, Colorado.

[fol. 113] IN SUPREME COURT OF COLORADO

MOTION FOR LEAVE TO FILE SUPPLEMENTAL ASSIGNMENT OF ERROR—Filed February 18, 1947

Comes now the plaintiff in error, Julius A. Wolf, defendant below, and moves this Honorable Court to grant a leave to file a supplemental assignment of error as follows:

1. That the court erred in overruling the motion of the defendant, Julius A. Wolf, to suppress as evidence a 1944 Day Book taken from the possession of the defendant, which book contained the names of patients and the nature of their ailment, and other matters which were of a wholly private and confidential nature. For the reason that said books and records were taken by the District Attorney of the City and County of Denver, a State Officer, without a search warrant or any other process of law, and violation of the rights of the defendant under the due-process clause of the Fourteenth Amendment of the Constitution of the United States, and the defendant specifically invokes the protection of the Fourteenth Amendment against said unlawful search and seizure.

(S) Philip Hornbein, Donald M. Shere, Attorneys for Plaintiff in Error, Julius A. Wolf, 620 Symes Building, Denver, Colorado—Ta. 5174.

Filed February 18, 1947.

[fol. 114] IN SUPREME COURT OF COLORADO

OBJECTION TO MOTION FOR LEAVE TO FILE SUPPLEMENTAL ASSIGNMENT OF ERROR—Filed February 21, 1947

Come now the defendants in error by H. Lawrence Hinkley, Attorney General, Duke W. Dunbar, Deputy Attorney General, and James S. Henderson, Assistant Attorney General, and objects to the motion to file heretofore tendered by the plaintiff in error, Julius A. Wolf, in the above-entitled cause, and as grounds therefor the Attorney General shows unto the Court that the matters and things therein referred to are, in substance, covered by the assignments of error presently on file in this Court; that all of the briefs have been written in this case, and the matter is now on the calendar of this Court for oral argument on the 3rd of March, A. D. 1947; and that under the circumstances the

said motion comes too late to be considered in this cause and tends only to augment an already lengthy record and to inject in other words a proposed assignment of error already covered by the assignments on file.

H. Lawrence Hinkley, Attorney General; Duke W. Dunbar, Deputy Attorney General; James S. Henderson, Assistant Attorney General, Attorneys for Defendants in Error, Address: 104 State Capitol, Denver Colorado.

[fol. 115] In Supreme Court of Colorado

[Title omitted]

Order Denying Motion for Leave to File Supplemental Assignment of Error—February 27, 1947

Upon consideration of the motion of the plaintiffs in error, and also the objections of the Attorney General thereto, asking leave to file supplemental assignments of error herein, the Court now being well advised, doth deny said motion.

[fol. 116] In Supreme Court of Colorado

15670

Julius A. Wolf, Charles H. Fulton and Betty Fulton, Plaintiffs in Error,

vs.

The People of the State of Colorado, Defendant in Error

Error to the District Court of the City and County of Denver

Judgment—November 24, 1947

This cause having been brought to this Court by writ of error to review the judgment of the District Court of the City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the Court upon the matters assigned as con-

stituting error in the proceedings and judgment of said District Court, and it now appearing to the Court that there is no error in the proceedings and judgment of said District Court,

It is therefore ordered and adjudged that the judgment of said District Court be, and the same is hereby, affirmed, and that it stand in full force and effect; and that this case be remanded to said District Court for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said District Court in the cause, notwithstanding the said writ of error.

[fol. 117] IN SUPREME COURT OF COLORADO

No. 15670

JULIUS A. WOLF, CHARLES H. FULTON and BETTY FULTON, Plaintiffs in Error,

vs.

THE PEOPLE OF THE STATE OF COLORADO, Defendant in Error

Error to the District Court of the City and County of Denver. Hon. Joseph E. Cook, Judge.

En Banc. Judgment Affirmed

OPINION—November 24, 1947

Mr. Chief Justice Burke delivered the opinion of the Court.

Plaintiffs in error are hereinafter referred to as defendants or by name. They were charged by information with conspiracy to commit an abortion. The woman involved was one Agnes Vera Bashor. On verdicts of guilty as to all Wolf and Fulton each received a sentence of fifteen months to five years in the penitentiary and Betty Fulton a sentence of one to two years. To review judgments entered accordingly they prosecute this writ. Their numerous assignments are somewhat complicated and largely repetitious. Those requiring any notice may however be properly classified approximately as they have been by the People in the brief of the Attorney General, i. e.: 1—The ver-

dict is unsupported by the evidence; 2—Erroneous admission of evidence; 3—Limitation of cross examination; 4—Admitting evidence of similar offenses; 5—Overruling motions for separate trials; 6—Erroneous instructions; 7—[fol. 118] Misconduct by the district attorney.

This is practically a companion case to No. 15666 decided by this court November 3, 1947, in that the principal question there considered is the principal one here. That case was tried December 4, 1944 before district judge Black and this February 25, 1945 before district judge Cook. Wolf is a plaintiff in error in each and the Fultons stand in this case in the position of Montgomery in the other. Save for Mr. Zarlengo, who did not appear in 15666, counsel in the cases were the same and they were argued together here. Exhibits A and C in the former case are Exhibits D and E here.

1—Assuming that the other alleged errors are without merit the evidence of the guilt of these defendants was overwhelming and what we said in the former case as to the plan of the conspiracy and the part each played in it is equally true here. Betty Fulton was the wife of Charles H. Fulton and assisted him in his work at his home. It should be added that no defendant in the instant case took the stand and no evidence was offered in their behalf.

2—This point relates to the admission of Exhibits D and E. The disposition of the question of their admissibility was disposed of in said case 15666 and is disposed of here in the same way and on the same authority and the opinion in that case must be read in connection herewith.

3—This point relates to an attempt to cross-examine the witness Bashor on an immaterial matter for the purpose of impeachment. Nothing more need be said about it.

4—The "similar offenses" of which evidence was admitted related entirely to the plan or scheme followed by defendants in the present case and was definitely limited to that purpose by the court's instruction.

5—A motion for separate trials was filed jointly by Charles and Betty Fulton. It was not pressed by the latter on the trial. The action of the defendants in respect to the offense charged was so interwoven and their plan to [fol. 119] work together so palpable and definitely disclosed by the evidence as to clearly support the ruling of the court.

6. Defendants tendered their instructions numbered 6, 8, 10 and 13. Numbers 6, 8 and 13 are based upon the theory that Wolf could not be convicted if he merely examined the patient to determine the question of pregnancy, or simply treated her after an abortion had been performed. Those instructions were properly refused because there was no evidence to support them. Instruction No. 10 attempts to apply the rule of reasonable doubt specifically to Betty Fulton. Counsel's reliance therefor is based upon the case of Payne v. People, 110 Colo. 235; 132 Pac. (2d) 442. The ruling in that case rested specifically upon evidence given by the plaintiff in error. This defendant did not testify and the record is entirely devoid of evidence to support such an instruction. Its substance was correctly stated in instructions given.

7. This assignment rests upon the contention that the district attorney in his closing argument commented upon the fact that defendant did not take the stand. It rests entirely upon counsel's construction of what was said. It appears that what was said was prompted by the argument of counsel for the defendants to the effect that those upon whom the alleged offense was committed were the real criminals and not being prosecuted, that it would be unjust to "permit these and other criminals, the real criminals, to roam the streets" and challenged the district attorney to explain to the jury in his address why Agnes Vera Bashor had not been charged with a criminal offense and why the witnesses called for the People were allowed to walk out of the court-room without any charge being filed against them. The record contains a counter showing to this but enough is disclosed to make it perfectly evident to the court that the language of the district attorney here objected to was prompted by some similar incident. It further appears that the district attorney did little more than mention the fact of the court's instruction concerning the failure of defendants to take the stand and discloses not the slightest attempt to use that failure against defendants. These arguments [fol. 120] are omitted from the record.

"In ordinary circumstances a judgment will not be reversed for improper argument where all arguments are not in the record so that it can be ascertained

whether the parts questioned were provoked or made in response to arguments of opposing counsel."

Pietch v. United States, 119 Fed. (2d) 817, 822.
Fries v. People, 80 Colo. 420; 252 Pac. 341.

It is clear that these defendants had a fair trial and that the record discloses no prejudicial error.

The judgment is accordingly affirmed.

Mr. Justice Hilliard dissenting.

[fol. 121] IN SUPREME COURT OF COLORADO

[Title omitted]

ORDER AS TO PETITIONS FOR REHEARING—December 4, 1947

Upon consideration of the motion of the plaintiff in error, Julius A. Wolf, and also the receipt of the defendant in error for a copy thereof; it is this day ordered that the petition for rehearing heretofore filed in No. 15666, being Julius A. Wolf and A. H. Montgomery versus the People of the State of Colorado, be the petition for rehearing in this case.

[fol. 122] IN SUPREME COURT OF COLORADO

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—December 15, 1947

The Court having considered the petition of the plaintiffs in error for a rehearing in this cause, and now being well and fully advised in the premises, doth order that said petition be, and the same is hereby, denied.

[fol. 123] IN SUPREME COURT OF COLORADO

[Title omitted]

ORDER STAYING EXECUTION—December 19, 1947

On consideration of the motion of the plaintiff in error, Julius A. Wolf, requesting stay of execution pending application for a writ of certiorari, and the representations therein made; it is ordered by the Chief Justice of the Supreme Court of the State of Colorado that the execution of the sentence herein against said plaintiff in error be and the same is hereby stayed for a period of sixty days from this date upon the giving of a good and sufficient bond, in the sum of Five Thousand Dollars ($5,000.00), conditioned as by law provided and approved by the undersigned and to be substituted for any bond heretofore given, whereupon execution shall be stayed as prayed and no remittitur shall issue during said period of sixty days.

Done and signed this 19th day of December, 1947.

(Signed) H. P. Burke, Chief Justice of the Supreme Court of the State of Colorado.

[fols. 124-126] Stay Bond on Appeal for $7,500.00 approved and filed December 19, 1947, omitted in printing.

[fol. 127] CLERK'S CERTIFICATE

Supreme Court of the State of Colorado.

I, O. E. Rickerson, Clerk of the Supreme Court of the State of Colorado, do hereby certify the foregoing as full, true and complete copies except full captions, titles and endorsements, omitted in pursuance of the rules of the Supreme Court of the United States of the following:

1. Abstract of Record.
2. Motion for Leave to File Supplemental Assignment of Error.
3. Objection to Motion for Leave to File Supplemental Assignment of Error.
4. Ruling of Court denying Motion for Leave to File Supplemental Assignment of Error.
5. Judgment of Court.

6. Opinion of Court.
7. Order that Petition for Rehearing in No. 15666 be considered as Petition for Rehearing in this case.
8. Order denying Petition for Rehearing.
9. Order Staying Execution.
10. Recognizance.

Had and filed in the Supreme Court of the State of Colorado in case No. 15670 wherein Julius A. Wolf and Charles H. Fulton and Betty Fulton were plaintiffs in error and the People of the State of Colorado were defendants in error, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the Supreme Court of the State of Colorado at my office in Denver, Colorado, this 23rd day of January, 1948.

O. E. Rickerson, Clerk of the Supreme Court of the State of Colorado. C. W. Sheafor, Deputy. (Seal.)

[fol. 128] Supreme Court of the United States

Order Allowing Certiorari—Filed April 26, 1948

The petition herein for a writ of certiorari to the Supreme Court of the State of Colorado is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1947

~~No. 513~~ 17

JULIUS A. WOLF, PETITIONER,

v.

THE PEOPLE OF THE STATE OF COLORADO,
RESPONDENT.

~~No. 514~~ 18

JULIUS A. WOLF, PETITIONER,

v.

THE PEOPLE OF THE STATE OF COLORADO,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO, AND BRIEF IN SUPPORT THEREOF.

PHILIP HORNBEIN,
PHILIP HORNBEIN, JR.,
DONALD M. SHERE,
Counsel for Petitioner,
620 Symes Building,
Denver 2, Colorado.

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IN THE

SUPREME COURT OF THE UNITED STATES

Term, 19....

No. .....

JULIUS A. WOLF, PETITIONER,

v.

THE PEOPLE OF THE STATE OF COLORADO, RESPONDENT.

No. .....

JULIUS A. WOLF, PETITIONER,

v.

THE PEOPLE OF THE STATE OF COLORADO, RESPONDENT.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO, AND BRIEF IN SUPPORT THEREOF.

Petitioner seeks review of two separate judgments of the Supreme Court of Colorado rendered in companion cases

dered them to go to the doctor's office and obtain the records (R. 18). The deputy district attorney testified that he went to the office of Dr. Wolf and saw the book marked Exhibit "A" that was on the table in the office and that he picked it up at the direction of the chief investigator (R. 19). The book was in the doctor's consultation room. He picked up the book, looked through the book, and it was his conclusion that the book contained the names of patients (R. 20). He had no search warrant or other order (R. 23). The investigator for the District Attorney testified (R. 21-24):

"At the time we were instructed to pick up any evidence that might be pertinent to the case (R. 21).

"When we went to Dr. Wolf's office we had no knowledge of Mildred Cairo. Never knew such a person existed. Went to Wolf's office to get his records and to arrest him. After we got to the District Attorney's office we looked through the record and looked up the names of the people in there. We found the name of Mildred Cairo. Then we contacted Mildred Cairo. We made an appointment to see her as a result of the knowledge which we obtained from the book. Then she came to our office and she told us all about it. Then we looked up names of other patients in this book. I don't know how many other names we looked up, possibly ten. We looked at every name in the book. Some names had an address, and some names a telephone number. We didn't know what these people were suffering from. We knew they were patients. They were women. We went out and contacted these people and went to find out for what purpose they went to Dr. Wolf. We didn't contact all of them. We only contacted those where there were prices stated. We contacted these people and made them come to the District Attorney's office. We didn't know what was the matter with them until they came. The only information we had so far as Miss Cairo was concerned came from the book. The same with all other cases, except Miss Martin's.

"We got about ten or twelve women in altogether. The information was filed against Dr. Wolf

on the information that the District Attorney had from the books" (R. 23-24).

When these facts were developed, a motion was made to quash the information and to instruct the jury to return a verdict of not guilty for the reason that the information was based wholly upon testimony and evidence that was obtained in violation of the constitution of the state and in violation of the Fourth and Fifth Amendments of the Constitution of the United States (R. 27-28). The motion was overruled and the objection to the books as evidence was likewise overruled (R. 29). The same books were used as evidence in the companion case, Wolf-Fulton (folios 594-601). In that case petitioner likewise filed a motion to suppress the illegally obtained evidence. It stated that the books were wrongfully seized in violation of the constitution of the state of Colorado and the Fourth and Fifth Amendments of the Constitution of the United States (folios 37-38). The same facts were developed with respect to search and seizure of the books as in the Montgomery case (folios 594-672). At the trial the motion was overruled (folio 91). Petitioner was convicted in both cases, separate writs of error were sued out from the Supreme Court and the convictions affirmed (R. 84; folios 1420-23).

MANNER IN WHICH THE CONSTITUTIONAL QUESTION WAS RAISED IN WOLF-MONTGOMERY CASE.

At the trial a motion was interposed to quash the information and for a directed verdict of not guilty because it appeared that the information was based wholly upon evidence that was obtained from the petitioner in violation of the constitution of the State, and also of the Fourth and Fifth Amendments of the Constitution of the United States (R. 27-28). In the motion for a new trial, it was alleged that the books were taken without a search warrant or other process of law in violation of the rights of petitioner under the Fourth Amendment of the Constitution of the United States (R. 66-68) and the same point was raised in the assignments of error filed in the Supreme Court (R. 73-74). Prior to the oral argument in the Supreme Court of the State, leave was asked to file a supplemental assignment

of error that the search and seizure of the books of the petitioner was in violation of the Fourteenth Amendment of the Constitution of the United States (R. 83). The purpose of this supplemental assignment of error was to guard against any possible technical objection as to the particular constitutional amendment involved. As already noted, the motions in the trial court and the assignments of error specifically invoked the protection of the search and seizure clause of the United States Constitution. The Fourth Amendment rather than the Fourteenth was invoked. It is submitted that as a matter of substance, it makes no difference which particular amendment was set forth as long as it was made clear to the Court that petitioner was claiming immunity from unreasonable search and seizure guaranteed by the United States Constitution. To cure any technical defect, we submitted the additional assignment of error setting forth the Fourteenth Amendment.

WOLF-FULTON CASE.

Petitioner filed a motion to suppress the evidence on the ground that the search and seizure of the books was in violation of the Fourth and Fifth Amendments of the Constitution of the United States (folios 33-45). The same claim was made in the motion for a new trial (folios 1236-1239) and in the assignment of error filed in the Supreme Court (folios 1349-1352). Also a motion for leave to file a supplemental assignment of error was filed setting forth that the seizure of the books was in violation of the Fourteenth Amendment of the Constitution of the United States (folios 1409-1412). The attorney general in opposition filed objections to this supplemental assignment of error on the ground that the assignment had already been covered in previous assignments (folios 1413-1415).

REASON RELIED ON FOR ALLOWANCE OF CERTIORARI.

The Colorado Supreme Court has decided a federal question of substance not heretofore determined by this Court.

The evidence used to convict petitioner was obtained by state officers by means of an unlawful search and seizure.

The convictions of petitioner by the use of such evidence deprived him of his liberty and property without due process of law contrary to the provisions of the Fourth and Fourteenth Amendments of the Constitution of the United States. The judgments of the Colorado Supreme Court sustaining the convictions decided an important question of federal law which has heretofore not been determined by this Court, to-wit: Whether the protection of the Fourth Amendment against unreasonable search and seizure has been made effective against state action by virtue of the Fourteenth Amendment.

QUESTION PRESENTED.

The sole question presented is whether the Fourth and Fourteenth Amendments of the Constitution of the United States protect a person from an unreasonable search and seizure by state officials.

SPECIFICATION OF ERRORS.

The Colorado Supreme Court erred:

1. In affirming the convictions of petitioner.

2. In holding that the evidence procured by an unlawful search and seizure was admissible against petitioner.

3. In failing to hold that such search and seizure and the use of evidence so obtained deprived petitioner of the protection of the Fourth and Fourteenth Amendments to the Constitution of the United States.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

We incorporate herein the statement of the case contained in the petition for certiorari.

This Court has held that the Fourth Amendment, like all other amendments, which constitute the federal Bill of Rights, has no application to the state governments. *National Safe Dep. Co. v. Illinois*, 232 U. S. 58. That decision was made without any consideration of the impact of the Fourteenth Amendment upon the Bill of Rights. The most recent pronouncement on this question is set forth in *Adamson v. People of California*, —— U. S. ——, 67 S. Ct. 1672. In

that case it was contended that the provisions of the Fifth Amendment against testimonial compulsion in a criminal case was made effective against state action by virtue of the Fourteenth Amendment. This contention was rejected, but in the decision of this Court it was said:

> "The due process clause of the Fourteenth Amendment, however, does not draw all the rights of the federal Bill of Rights under its protection. That contention was made and rejected in Palko v. Connecticut, 302 U. S. 319, 323, 58 S. Ct. 149, 150, 82 L. Ed. 288. It was rejected with citation of the cases excluding several of the rights protected by the Bill of Rights, against infringement by the National Government. Nothing has been called to our attention that either the framers of the Fourteenth Amendment or the states that adopted intended its due process clause to draw within its scope the earlier amendments to the Constitution. Palko held that such provisions of the Bill of Rights as were '*implicit in the concept of ordered liberty*,' 302 U. S. at page 325; 58 S. Ct. at pages 151, 152, became secure from state interference by the clause. But it held nothing more" (Page 1676). (Italics added.)

In *Palko v. Connecticut*, 302 U. S. 319, 323, which was apparently approved in the *Adamson* case, supra, this Court indicated the proper rule for determining the applicability of specific immunities of the Bill of Rights to state governments:

> "On the other hand, the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress * * * or the like freedom of the press * * *, or the free exercise of religion * * * or the right of peaceable assembly without which speech would be unduly trammeled * * * or the right of one accused of crime to the benefit of counsel * * *. In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept

of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states."

Speaking of the due-process clause, this Court in *Herbert v. State of Louisiana*, 272 U. S. 312, 316, said:

> "The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several states and make them the test of what it requires; nor does it enable this court to revise the decisions of the state courts on questions of state law. What it does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.'"

In *Twining v. New Jersey*, 211 U. S. 78, 101, this Court said:

> "The words 'due process of law' were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

It remains to be considered whether the right of privacy guaranteed by the Fourth Amendment is a right "implicit in the concept of ordered liberty." The historic *Boyd* case, 116 U. S. 616, shows plainly enough that there can be no ordered liberty and men cannot be free where the government is vested with arbitrary power to conduct general raids and searches. It was the objection to general warrants and writs of assistance issued by the British government which led to the resistance by the colonies to the oppression of the mother country. We quote from the *Boyd* case:

> "The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book;' since they placed 'the liberty

of every man in the hands of every petty officer.' This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.'" *Boyd v. United States*, 116 U. S. 616, 625.

In *Harris v. United States*, —— U. S. ——, 67 S. Ct. 1098, 1103, it was stated:

"The dangers to fundamental personal rights and interests resulting from excesses of law-enforcement officials committed during the course of criminal investigations are not illusory."

In Mr. Justice Frankfurter's dissenting opinion in that case, concurred in by Mr. Justice Murphy and Mr. Justice Rutledge, it was said:

"If one thing on this subject can be said with confidence it is that the protection afforded by the Fourth Amendment against search and seizure by the police, except under the closest judicial safeguards, is not an outworn bit of Eighteenth Century romantic rationalism but an indispensable need for a democratic society" (Page 1106).

"This is the historic background against which the undisputed facts of this case must be projected. For me the background is respect for that provision of the Bill of Rights which is central to enjoyment of the other guarantees of the Bill of Rights. How can there be freedom of thought, or freedom of speech or freedom of religion, if the police can, without warrant, search your house and mine from garret to cellar merely because they are executing a warrant of arrest? How can men feel free if all their papers may be searched, as an incident to the arrest of someone in the house, on the chance that something may turn up, or rather, be turned up? Yesterday the justify-

ing document was an illicit ration book, tomorrow it may be some suspect piece of literature" (Page 1107).

And in the dissenting opinion of Mr. Justice Murphy in which Mr. Justice Frankfurter and Mr. Justice Rutledge join, it was said:

> "To break and enter, to engage in unauthorized and unreasonable searches, to destroy all the rights to privacy in an effort to uproot crime may suit the purpose of despotic power, but those methods cannot abide the pure atmosphere of a free society" (Page 1117).

> "But freedom from unreasonable search and seizure is one of the cardinal rights of free men under our Constitution. That freedom belongs to all men, including those who may be guilty of some crime. The public policy underlying the constitutional guarantee of that freedom is so great as to outweigh the desirability of convicting those whose crime has been revealed through an unlawful invasion of their right of privacy. Lawless methods of law enforcement are frequently effective in uncovering crime, especially where tyranny reigns, but they are not to be countenanced under our form of government. It is not a novel principle of our constitutional system that a few criminals should go free rather than that the freedom and liberty of all citizens be jeopardized" (Page 1118).

Mr. Justice Jackson in his dissenting opinion stated:

> "Of course, this, like each of our constitutional guaranties, often may afford a shelter for criminals. But the forefathers thought this was not too great a price to pay for that decent privacy of home, papers and effects which is indispensable to individual dignity and self respect" (Page 1120).

In *Olmstead v. United States*, 277 U. S. 438, 478, Mr. Justice Brandeis in a dissenting opinion said:

> "The protection guaranteed by the amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the

presenting identical Constitutional questions. The titles of the cases below were:

Julius A. Wolf and A. H. Montgomery v. The People of the State of Colorado, No. 15666

and

Julius A. Wolf; Charles H. Fulton and Betty Fulton v. The People of the State of Colorado, No. 15670.

Neither case has been officially reported.

Hereinafter for the sake of brevity, the former will be referred to as the Wolf-Montgomery case, and the latter as the Wolf-Fulton case.

All page references are to the Wolf-Montgomery record. Folio references are to the record in the Wolf-Fulton case.

BASIS ON WHICH IT IS CONTENDED THAT THIS COURT HAS JURISDICTION.

Jurisdiction exists by virtue of Sec. 237(b) of the Judicial Code as amended by the Act of February 13, 1925 (Chapter 229, 43 Stat. 936).

The Supreme Court of the State of Colorado, being the highest court of law and equity in said State, has rendered its final judgment and decision in these causes wherein a right, privilege and immunity under the Constitution of the United States has been specially set up and claimed by petitioner, to-wit, freedom from unreasonable search and seizure by virtue of the Fourth and Fourteenth Amendments of the Constitution of the United States.

DATES OF JUDGMENTS.

Wolf-Montgomery Case.

The Court rendered its judgment November 3, 1947 (R. 84). The petition for rehearing was denied December 8, 1947 (R. 95).

Wolf-Fulton Case.

Judgment was entered November 24, 1947 (folios 1420-23). Petition for rehearing was denied December 15, 1947 (folio 1441).

STATEMENT OF THE CASE.

Petitioner, Julius A. Wolf, and one, A. H. Montgomery, were charged by information filed in the District Court of the City and County of Denver with conspiracy to perform an abortion on one, Mildred Cairo (R. 1). In another case petitioner and one, Charles Fulton, and one, Betty Fulton, were charged with conspiracy to commit an abortion (folios 1-6). Neither Montgomery nor the Fultons join in this petition. The names of the alleged co-conspirators are mentioned for the purpose of identifying the two cases.

The cases were tried separately and separate writs of error sued out from the Colorado Supreme Court, but were argued together, and while separate opinions were written, the opinion on the constitutional question in the Wolf-Montgomery case was adopted by reference as the opinion in the Wolf-Fulton case (folio 1430). The constitutional question which we are seeking to review by certiorari is the same in both cases. It appears from the record in both cases that investigators and officers of the district attorney's office, some of whom were attorneys at law, without a search warrant or order of Court entered the private office of petitioner, who is a duly licensed and qualified practicing physician, put him under arrest and seized his private books and records (R. 18-26). The books and records contained the names, addresses, and telephone numbers of his patients (R. 20). These books were taken from the doctor's office and were thoroughly examined by the district attorney's officers, and the patients, all women whose names and addresses appeared in said books, were brought to the district attorney's office and interrogated as to the purpose of their visit to the doctor and as to what ailment they were suffering from (R. 23-24).

As a result of the information obtained from the books so seized, followed up by an inquisition of the patients, an information was filed against petitioner. At the time of the trial the investigators and officers of the district attorney's office gave testimony as to how they obtained the books (R. 18-26). The chief investigator testified that he instructed three of the attaches of the district attorney's office, two of whom were attorneys, to arrest petitioner (R. 17). He or-

pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, *the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.* To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth." (Italics ours.)

In the *Olmstead* case, *supra,* there was disagreement among the Justices as to whether there could be a search and seizure with respect to something intangible, but there was no division of the Court as to the purpose and historical background of the Fourth Amendment.

In a dissenting opinion in *Goldman v. United States,* 316 U. S. 129, 142, Mr. Justice Murphy speaking of the Fourth Amendment said:

"The benefits that accrue from this and other articles of the Bill of Rights are characteristic of democratic rule. They are among the amenities that distinguish a free society from one in which the rights and comforts of the individual are wholly subordinated to the interests of the state. We cherish and uphold them as necessary and salutary checks on the authority of government. They provide a standard of official conduct which the courts must enforce. At a time when the nation is called upon to give freely of life and treasure to defend and preserve the institutions of democracy and freedom, we should not permit any of the essentials of freedom to lose vitality through legal interpretations that are restrictive and inadequate for the period in which we live."

General raids and exploratory searches for evidence are a handy weapon for despotic governments. Such odious practices were used to suppress free speech and free press.

The struggle against search and seizure went hand in hand with the struggle for freedom of the press. See Chafee, *Freedom of Speech*, Ch. VI. Long before the American revolution, the security of the English home against unwarranted entry by the King's officers had become a firmly established principle in English constitutional law, as evidenced by the historic words uttered by Lord Chatham:

> "The poorest man may in his cottage bid defiance to all the forces of the Crown; it may be frail, its roof may shake, the wind may blow through it; the storm may enter, the rain may enter; but the King of England can not enter; all his forces dare not cross the threshold of that ruined tenement."

The importance of this doctrine in the English common law is pointed out in 2 *Story on the Constitution*, page 648:

> "This provision [against unreasonable search and seizure] seems indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property. It is little more than the affirmance of a great constitutional doctrine of the common law, and its introduction into the amendments was doubtless occasioned by the strong sensibility excited, both in England and America upon the subject of general warrants almost upon the eve of the American revolution."

And Stimson in *The Law of Federal and State Constitutions*, page 46, states:

> "It [rule against search and seizure] is, of course, closely connected with the right of a person not to be compelled to give self-criminating evidence, but it has a far broader historical connection, with the general objection of the Englishman to inquisitions, visitatorial expeditions by king or Crown officer, going straight back, indeed, to the great clause of Magna Carta."

The right of free speech and free press is an inherent right of every citizen of the United States. See *Hague v. Committee for Industrial Organization*, 307 U. S. 496. The Fourth Amendment is a necessary implementation of the basic democratic right of free speech, without which it cannot exist.

The search and seizure involved in these cases was general and exploratory, specifically designed to obtain evidence, and not contraband or the fruits or means of crime. *(United States, v. Lefkowitz,* 285 U. S. 452; cf. *Harris v. United States,* supra.) Moreover, the information that was obtained from this exploratory search was used by officers of the state acting under color of authority to force female patients of a practicing physician to disclose the intimate details of their private lives (R. 24). In this respect the general raid conducted in this case was more odious than any recorded in the history of American Jurisprudence. (Cf. *People v. Martin,* 382 Ill. 192; 46 N. E. (2d) 997; *People v. Schmoll,* 383 Ill. 280; 48 N. E. (2d) 993.

In the early days of common law when it became necessary to inquire into the physical condition of a woman prisoner a writ *De Ventre Inspiciendo* was directed to a discreet matron. (1 *Blackstone Comm.* 456). We do not believe that even in a police state, male law-enforcement officers would be authorized to conduct a forced inquisition into the intimate affairs of a sinning woman. One of the women patients was threatened with a ride in the police patrol "wagon" unless she "cooperated" with the district attorney (folio 872). She was held in the district attorney's office for two hours until she agreed to cooperate (folio 875). So the search in these cases had all the obnoxious features of the general search for evidence, but was in addition shockingly indecent, and wholly repugnant to decent standards of civilization. The essential privacy of the physician-patient relationship is noted in the dissenting opinion of Mr. Justice Butler in the *Olmstead* case, *supra:*

> "* * * communications that are private and privileged—those between physician and patient, lawyer and client, parent and child, husband and wife" (Page 487 of 277 U. S.).

and also in the dissenting opinion of Mr. Justice Murphy in *Goldman v. United States, supra,*

> "If the method and habits of the people in 1787 with respect to the conduct of their private business had been what they are today, is it possible to think that the framers of the Bill of Rights would have been any less solicitous of the privacy of transactions conducted in the office of a lawyer, a doctor, or a man of business, than they were of a person's papers and effects?" (Pages 138, 139 of 316 U. S.).

The Supreme Court of Colorado in its opinion stated:

> "It seems superfluous to add that nothing here or heretofore said by us and nothing contained in any of the numerous decisions of other jurisdictions in support of the rule in the Massantonio case, justifies unlawful searches or seizures. In line with such jurisdictions we have condemned them in the strongest terms and pointed out the proper remedy" (R. 87, 88).

In the case referred to by the Supreme Court, *Massantonio v. People*, 77 Colo. 392; 236 P. 1019, the Court said:

> "The parties aggrieved should be left to independent action to protect their constitutional rights, and obtain redress for their infringement, and if in such a proceeding error is committed, it should be determined in some appropriate method of review upon its own record, and not collaterally on appeal from a judgment of conviction in a criminal case in which the seized property was used as evidence" (Page 399).

The Colorado Supreme Court in that case severely condemns the conduct of law enforcement officers perpetrating unlawful searches and seizures:

> "Every officer making an unconstitutional search, and every officer advising or conniving at such conduct is a law violator and a violator of his oath of office, and should be held to accountability" (Page 400).

Thus the Colorado Court very severely excoriates the conduct of officers who conduct searches without search war-

rants, yet it sanctions the use of evidence wrongfully obtained in violation of the Constitution. The Colorado Court was moved by the plea of necessity. The criminal code could not be enforced unless evidence was used, no matter how obtained, it was said. As to this plea of necessity, this Court in the case of *United States v. Michael DiRe* decided January 5, 1948 (—— U. S. ——; 68 S. Ct. 222, 229) said:

> "We meet in this case, as in many, the appeal to necessity. It is said that if such arrest and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them. The conviction based on evidence so obtained cannot stand."

It is submitted that a writ of certiorari be issued in both cases so that the important question here involved may be fully presented and argued before this Court.

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1948

No. 17.

JULIUS A. WOLF, PETITIONER,

v.

THE PEOPLE OF THE STATE OF COLORADO.

No. 18.

JULIUS A. WOLF, PETITIONER,

v.

THE PEOPLE OF THE STATE OF COLORADO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO.

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IN THE

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO.

BRIEF OF PETITIONER

OPINIONS BELOW.

The opinion of the Supreme Court of the State of Colorado in case No. 17 is reported under the name of *Wolf, et al. v. The People*, 117 Colo. 279; 187 P. (2d) 926.

The opinion of the Supreme Court of the State of Colorado in case No. 18 is reported under the name of *Wolf, et al. v. The People*, 117 Colo. 321, 187 P. (2d) 928.

JURISDICTION.

Jurisdiction exists by virtue of Title 28, United States Code, Sec. 1257 (3).

The Supreme Court of the State of Colorado, being the highest court in said State, has rendered its final judgment and decision in these cases (17 R. 51-56; 18 R. 67-71) wherein a right, privilege and immunity under the Constitution of the United States has been specially set up and claimed by petitioner, to-wit: freedom from unreasonable search and seizure by virtue of the Fourth and Fourteenth Amendments of the Constitution of the United States. (Case No. 17, R. 17, 41, 42, 45, 46, 50, 51; Case No. 18, R. 5-7, 47, 48, 55, 56, 66).

DATES OF JUDGMENTS.

The judgment of the Supreme Court of Colorado in case No. 17 was entered on November 3, 1947 (17 R. 51). Petition for Rehearing was denied December 8, 1947 (17 R. 59). Petition for Certiorari was filed February 14, 1948, and was granted April 26, 1948 (17 R. 60).

In case No. 18, the judgment of the Supreme Court was entered November 24, 1947 (18 R. 67). Petition for Rehearing was denied December 15, 1947 (18 R. 71). Petition for certiorari was filed February 14, 1948, and granted April 26, 1948 (18 R. 73).

CONSTITUTIONAL QUESTION INVOLVED.

The sole question presented is whether or not the Fourteenth Amendment has made the right established by the Fourth Amendment effective against state action—that is, whether the privacy of a citizen is protected from unreasonable search and seizure when the same is perpetrated by state officers acting under state law.

SPECIFICATION OF ERRORS TO BE RELIED ON.

The Colorado Supreme Court erred:

1. In affirming the convictions of petitioner.

2. In holding that the evidence procured by an unlawful search and seizure was admissible against petitioner.

3. In failing to hold that such search and seizure and the use of evidence so obtained deprived petitioner of the protection of the Fourth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE.

This brief is filed in behalf of the petitioner in cases No. 17 and No. 18. Record references to case No. 17 will be indicated as 17 R.—— and to case No. 18 as 18 R.——. They will refer to the page numbers of the printed transcript.

Petitioner was charged by informations filed in two separate cases in the District Court of the City and County of Denver with conspiracies to perform an abortion (17 R. 1; 18 R. 1). None of the other alleged co-conspirators joins in this petition.

The cases were tried separately and separate writs of error sued out from the Colorado Supreme Court, but were argued together; and while separate opinions were written, the opinion on the constitutional question in No. 17 (17 R. 54, 55) was adopted by reference as the opinion in No. 18 (18 R. 69). The constitutional question which we are seeking to review is the same in both cases. It appears from the record in both cases that investigators and officers of the district attorney's office, some of whom were attorneys at law, without a search warrant or order of court entered the private office of petitioner, who is a duly licensed and qualified practicing physican, put him under arrest and seized his private books and record (17 R. 11-16; 18 R. 27-29). The books and records contained the names, addresses, and telephone numbers of his patients (17 R. 12; 18 R. 28). These books were taken from the doctor's office and were thoroughly examined by the district attorney's officers and the patients, whose names and addresses appeared in said books, were brought to the district attorney's office and interrogated as to the purpose of their visit to the doctor and as to what ailment they were suffering from (17 R. 14, 15; 18 R. 28).

As a result of the information obtained from the books so seized, followed by an inquisition of the patients, informations were filed against petitioner (17 R. 15). At the trial of each case the investigators and officers of the district attorney's office gave testimony as to how they obtained the books (17 R. 11-15; 18 R. 27-28). The chief investigator testified that he instructed three of the attaches of the district attorney's office, two of whom were attorneys to arrest petitioner (17 R. 11). He ordered them to go to the doctor's office and obtain the records (17 R. 11; 18 R. 28). The deputy district attorney testified that he went to the office of Dr. Wolf and saw the book, referred to as Exhibit "A" in case No. 17 (17 R. 11; offered at 17 R. 9, and admitted at 17 R. 18) and referred to as Exhibit "E" in case No. 18 (18 R. 27; offered and admitted 18 R. 33), which was on the table in the office and that he picked up the book, looked through the book, and it was his conclusion that the book contained the names of patients (17 R. 12). He had no search warrant or other order (17 R. 11). The investigator for the District Attorney testified:

> "At the time we arrested him we had instructions to pick up any evidence that might be pertinent to the case (17 R. 13).
>
> "When we went to Dr. Wolf's office we had no knowledge of Mildred Cairo. Never knew such a person existed. Went to Wolf's office to get his records and to arrest him. After we got to the District Attorney's office we looked through the record and looked up the names of the people in there. We found the name of Mildred Cairo. Then we contacted Mildred Cairo. We made an appointment to see her as a result of the knowledge which we obtained from the book. Then she came to our office and she told us all about it. Then we looked up names of other patients in this book. I don't know how many other names we looked up, possibly ten. We looked at every name in the book. Some names had an address, and some names a telephone number. We didn't know what these people were suffering from. We knew they were patients. They

were women. We went out and contacted these people and went to find out for what purpose they went to Dr. Wolf. We didn't contact all of them. We only contacted those where there were prices stated. We contacted these people and made them come to the District Attorney's office. We didn't know what was the matter with them until they came. The only information we had so far as Miss Cairo was concerned came from the book. The same with all other cases, except Miss Martin's (17 R. 14, 15).

"We got about ten or twelve women in altogether. The information was filed against Dr. Wolf on the information that the District Attorney had from the books." (17 R. 15).

Six women whose names were found in the doctor's book were brought to the district attorney's office and subjected to an inquisition. As to the procedure followed by the district attorney and his officers in the interrogation of these women, we refer to what they said in court:

J. Z. testified under cross-examination as follows (18 R. 32):

"I signed a statement in the district attorney's office.

"I was informed that I could be prosecuted but that if I cooperated that most likely nothing would be done. I gathered this impression from Mr. Humphreys.

"He used the word 'cooperation.' He told me that I had committed a crime and asked for my cooperation.

"Mr. Malach showed me my statement this morning.

"I did not go to the district attorney's office voluntarily. I objected to coming to the district attorney's office, and they said they would send the wagon out, so I said I would come down peacefully. I am not married.

"I was in the district attorney's office for several hours. At first I refused to cooperate, but after two hours I told them my story."

"They threatened to bring me down in the patrol. Again I refused to talk for almost an hour. They told me that I was an accomplice and that I had committed a crime, but they led me to believe that if I cooperated I would not be prosecuted."

M. L. R. testified under cross examination (18 R. 34):

"I didn't voluntarily make a complaint against them. I was taken to the district attorney's office. I was questioned by Mr. Humphreys and two men. They said they wanted me to cooperate with the district attorney. I was scared and nervous."

B. B. testified under cross examination as follows (18 R. 35):

"I was called to come to the district attorney's office by Mr. Humphreys. He informed me that I might be prosecuted. I signed a statement.

"I asked him what would come of all this and he said that he hoped nothing, but that I had been in on it, and that my abortion was a crime."

Petitioner filed motions for the return of his books and records (17 R. 5; 18 R. 5-7) which were denied (17 R. 18; 18 R. 11). The book containing the names of petitioner's patients was offered in evidence by the district attorney (17 R. 9; 18 R. 33), objected to by petitioner (17 R. 9; 18 R. 33), and admitted into evidence (17 R. 18; 18 R. 33).

Petitioner moved to quash the information and for a directed verdict of not guilty on the ground that the information and the action were based on evidence obtained from petitioner in violation of his rights under the Fourth and Fifth Amendments to the Constitution of the United States (17 R. 17).

Petitioner was found guilty and sentenced to terms in

the State Penitentiary (17 R. 44; 18 R. 55). The judgment of the trial court were affirmed by the Supreme Court of Colorado (17 R. 51, 52; 18 R. 67, 68).

SUMMARY OF ARGUMENT.

Although the specific question has never been decided, the concept of due process developed by this Court necessarily implies freedom from unreasonable search and seizure. The due-process clause of the Fourteenth Amendment requires that actions of state officials shall not violate the basic principles of liberty and justice inherent in our political institutions. Among these basic principles is the protection of a person's privacy from arbitrary governmental interference. Protection against unreasonable search and seizure is "implicit in the concept of ordered liberty" and is therefore covered by the due process clause of the Fourteenth Amendment.

Protection from unreasonable search and seizure is essential to the preservation of other constitutional rights. The exploratory search for evidence is a tool of the despotic police state and has no place in a democratic government. Freedom from search and seizure without a warrant is a basic right of Englishmen dating back to the Magna Charta, and is an essential element of the concept of due process of law.

The search and seizure in this case was unreasonable and violated the due process clause of the Fourteenth Amendment. The use of the books wrongfully seized from petitioner as evidence in the trial of these cases violated the due process clause of the Fourteenth Amendment.

ARGUMENT.

I. *Although The Specific Question Has Never Been Decided, The Concept Of Due Process Developed By This Court Necessarily Embraces Freedom From Unreasonable Search And Seizure.*

This Court has held that the Fourth Amendment, like all other amendments which constitute the federal Bill of

Rights, has no application to the state governments. *National Safe Dept. Co. v. Illinois*, 232 U. S. 58. That decision was made without any consideration of the impact of the Fourteenth Amendment upon the Bill of Rights. Twice this Court has expressly declined to consider whether the Fourteenth Amendment has made the provisions of the Fourth Amendment applicable to the state governments. *Adams v. New York*, 192 U. S. 585, 594; *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 551. In *Weeks v. United States*, 232 U. S. 383, there is a dictum to the effect that the limitations of the Fourth Amendment apply only to the federal government and its officials (p. 398). The effect of the due process clause of the Fourteenth Amendment was not considered. However, in its discussion of the reason, origin, and history of the Fourth Amendment, this Court in the *Weeks* case, *supra*, very strongly indicated that the right of privacy is a basic right of the citizen. This Court said:

> "As was there shown, it took its origin in the determination of the framers of the Amendments to the Federal Constitution to provide for that instrument a Bill of Rights, securing to the American people, among other things, those safeguards which had grown up in England to protect the people from unreasonable searches and seizures, such as were permitted under the general warrants issued under authority of the government, by which there had been invasions of the home and privacy of the citizens, and the seizure of their private papers in support of charges, real or imaginary, made against them. Such practices had also received sanction under warrants and seizures under the so-called writs of assistance, issued in the American colonies. See 2 Watson, Const. 1414 *et seq.* Resistance to these practices had established the principle which was enacted into the fundamental law in the 4th Amendment, that *a man's house was his castle*, and not to be invaded by any general authority to search and seize his goods and papers. Judge Cooley, in his Constitutional Limitations, pp. 425, 426, in treating of this feature of our Constitution

said: 'The maxim that 'every man's house is his castle' is made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizen.' 'Accordingly,' says Lieber, in his work on Civil Liberty and Self-Government, 62, in speaking of the English law in this respect, 'no man's house can be forcibly opened, or he or his goods be carried away after it has thus been forced, except in cases of felony; and then the sheriff must be furnished with a warrant, and take great care lest he commit a trespass. This principle is jealously insisted upon.'". (p. 390 of 232 U. S.; Italics added).

A. The due-process clause of the Fourteenth Amendment requires that actions of state officials shall not violate the basic principles of liberty and justice inherent in our political institutions.

It is our position that the concept of due process as it has been gradually evolved by the decisions of this Court necessarily compels protection of one's privacy from governmental oppression.

In *Twining v. New Jersey*, 211 U. S. 78, 99, 100. The Court said:

> "* * * it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. * * * If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law. Few phrases of the law are so elusive of exact apprehension as this. Doubtless the difficulties of ascertaining its connotation have been increased in American jurisprudence, where it has been embodied in constitutions and put to new uses as a limit on legislative power. This court has always declined to give a comprehensive definition of it, and has preferred that its full meaning should be gradually ascertained by the process of

inclusion and exclusion in the course of the decisions of cases as they arise. There are certain general principles, well settled, however, which narrow the field of discussion, and may serve as helps to correct conclusions. These principles grow out of the proposition universally accepted by American courts on the authority of Coke, that the words 'due process of law' are equivalent in meaning to the words 'law of the land,' contained in that chapter of Magna Carta which provides that 'no freeman shall be taken, or imprisoned, or disseised, or outlawed, or exiled, or any wise destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land.'"

Speaking of the due-process clause, this Court in *Hebert v. State of Louisiana*, 272 U. S. 312, 316, said:

"The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several states and make them the test of what it requires; nor does it enable this court to revise the decisions of the state courts on questions of state law. What it does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.'"

In the *Twining* case, *supra* this Court said (p. 101 of 211 U. S.):

"The words due process of law 'were intended to secure the individual from the *arbitrary exercise of the powers of government*, unrestrained by the established principles of private rights and distributive justice.'" (Italics added).

In *Palko v. Connecticut*, 302 U. S. 319, 324, this Court indicated the proper rule for determining the applicability of specific immunities of the Bill of Rights to state governments:

> "On the other hand, the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress * * * or the like freedom of the press * * *, or the free exercise of religion * * * or the right of peaceable assembly without which speech would be unduly trammeled * * * or the right of one accused of crime to the benefit of counsel * * *. In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be *implicit in the concept of ordered liberty*, and thus, through the Fourteenth Amendment, become valid as against the states." (Italics added)

The latest pronouncement of this Court on the question here involved is *Adamson v. People of California*, 332 U. S. 46, 53-54, in which the Court said:

> "The due process clause of the Fourteenth Amendment, however, does not draw all the rights of the federal Bill of Rights under its protection. That contention was made and rejected in Palko v. Connecticut, 302 U. S. 319, 323. It was rejected with citation of the cases excluding several of the rights protected by the Bill of Rights, against infringement by the National Government. Nothing has been called to our attention that either the framers of the Fourteenth Amendment or the states that adopted intended its due process clause to draw within its scope the earlier amendments to the Constitution. Palko held that such provisions of the Bill of Rights as were *'implicit in the concept of ordered liberty,'* 302 U. S. at page 325, became secure from state interference by the clause. But it held nothing more." (Italics added)

Apparently, the Court in the Adamson case adopted the formula suggested in the *Palko* case by Justice Cardoza, which in turn follows the principle of the *Twining* case.

B. Freedom from unreasonable search and seizure is "implicit in the concept of ordered liberty."

The question must then be tested by inquiring as to whether or not the right of privacy guaranteed by the Fourth Amendment is "implicit in the concept of ordered liberty." In the *Adamson* and *Twining* cases, the Court held that a state law or constitution which authorizes the district attorney to comment on the failure of an accused to give testimony was not offensive to the due process clause. We believe, however, that those rulings are not persuasive here. In those cases, the Court sustained the validity of state laws authorizing the district attorney to comment on the failure of an accused to testify, but the right of the district attorney to make such comment was established and controlled by general law which was interpreted and applied by a court sitting in judgment with both parties present with the right to be heard, whereas, in the case of an unreasonable search and seizure, the officer perpetrating it acts beyond the bounds of the law and in accordance with his own unbridled whim. In cases where police officers obtain confessions by coercion, it is held to be beyond the pale of due process. *Malinski v. New York*, 324 U. S. 401; *Ward v. Texas*, 316 U. S. 547; *Hysler v. Florida*, 315 U. S. 411; *Chambers v. Florida*, 309 U. S. 227; *Ashcraft v. Tennessee*, 322 U. S. 143; 327 U. S. 274. The seizure of evidence by police officers without warrant violates the due process clause of the Fourteenth Amendment in the same way as does the use of coercion to compel self-incrimination.

The Fourth Amendment was intended to forever abolish general and exploratory searches and seizures under so-called writs of assistance. It was the universal belief of the founders of our government that such practices were odious and utterly incompatible with free institutions.

> "The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental

principles of law, that ever was found in an English law book; since they placed 'the liberty of every man in the hands of every petty officer.' This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.' *Boyd v. United States*, 116 U. S. 616, 625.

This Court has never departed from the above decision. It has been re-affirmed many times. In the recent case of *Harris v. United States*, 331 U. S. 145, 155; this Court said:

> "The dangers to fundamental personal rights and interests resulting from excesses of law-enforcement officials committed during the course of criminal investigations are not illusory. This Court has always been alert to protect against such abuse. But we should not permit our knowledge that abuses sometimes occur to give sinister coloration to procedures which are basically reasonable. We conclude that in this case the evidence which formed the basis of petitioner's conviction was obtained without violation of petitioner's rights under the Constitution."

C. Protection against unreasonable search and seizure is necessary to the preservation of other constitutional rights.

The struggle against search and seizure went hand in hand with the struggle for freedom of the press. See Chafee, *Freedom of Speech*, Ch. VI. Long before the American revolution, the security of the English home against unwarranted entry by the King's officers had become a firmly established principle in English constitutional law, as evidenced by the historic words uttered by Lord Chatham:

> "The poorest man may in his cottage bid defiance to all the forces of the Crown; it may be frail, its roof may shake, the wind may blow through it;

> the storm may enter, the rain may enter; but the King of England cannot enter; all his forces dare not cross the threshold of that ruined tenement." (cited in Chafee, *Freedom of Speech*, p. 296).

The importance of this doctrine in the English common law is pointed out in 2 *Story on the Constitution*, page 648:

> "This provision [against unreasonable search and seizure] seems indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property. It is little more than the affirmance of a great constitutional doctrine of the common law. And its introduction into the amendments was doubtless occasioned by the strong sensibility excited, both in England and America, upon the subject of general warrants almost upon the eve of the American revolution."

And Stimson in *The Law of Federal and State Constitutions*, page 46, states:

> "It [rule against search and seizure] is, of course, closely conected with the right of a person not to be compelled to give self-criminating evidence, but it has a far broader historical connection, with the general objection of the Englishman to inquisitions, visitatorial expeditions by king or Crown officer, going straight back, indeed, to the great clause of Magna Carta."

General raids and exploratory searches for evidence are a handy weapon for despotic governments. Such odious practices are used to suppress free speech and free press.

The right of free speech and free press is an inherent right of every citizen of the United States. See *Hague v. Committee for Industrial Organizations*, 307 U. S. 496. The Fourth Amendment is a necessary implementation of the basic democratic right of free speech, without which it cannot exist. As already observed, this Court has never been called on to decide the specific question here, but there are numerous statements in the opinions of this Court which

conclusively show that immunity from searches and seizures is of the very essence of liberty, an essential right of free citizenship, and an absolutely necessary limitation on the powers of government. All will agree, of course, that a government may abuse its legitimate functions. This is proven by past and contemporaneous history. It is precisely because a government with unlimited powers oppresses the people, that constitutions were written and certain basic fundamental rights established in the citizenry which even the government can not violate.

> "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire * * *, and to direct fishing expeditions into private papers on the possibility that that may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the Commission's wholesale demand would cause are the least considerations. It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up. *Federal Trade Commission v. American Tobacco Co.* 264 U. S. 298, 305-306.

In the instant case a doctor's private records containing the names of his patients were taken from his office.

We quote from the dissenting opinion of Mr. Justice Frankfurter in *Harris v. United States, supra*, at page 163 of 331 U. S.:

> "This is the historic background against which the undisputed facts of this case must be projected. For me the background is respect for that provision of the Bill of Rights which is central to enjoyment of the other guarantees of the Bill of Rights.

> How can there be freedom of thought or freedom of speech or freedom of religion, if the police can, without warrant, search your house and mine from garret to cellar merely because they are executing a warrant of arrest? How can men feel free if all their papers may be searched, as an incident to the arrest of someone in the house, on the chance that something may turn up, or rather, be turned up? Yesterday the justifying document was an illicit ration book, tomorrow it may be some suspect piece of literature."

When we quote from dissenting opinions it is on a point concerning which there was no disagreement between majority and minority. In the dissenting opinion of Mr. Justice Murphy in *Harris v. United States, supra.* at page 193 of 331 U. S., it was said:

> "The key fact of this case is that the search was lawless. A lawless search cannot give rise to a lawful seizure, even of contraband goods. And 'good faith' on the part of the arresting officers cannot justify a lawless search, nor support a lawless seizure. In forbidding unreasonable searches and seizures, the Constitution made certain procedural requirements indispensable for lawful searches and seizures. It did not mean, however, to substitute the good intentions of the police for judicial authorization except in narrowly confined situations. History, both before and after the adoption of the Fourth Amendment has shown good police intentions to be inadequate safeguards for the precious rights of man."

From the dissenting opinion of Mr. Justice Jackson in the *Harris* case, *supra,* at page 198 of 331 U. S., we quote:

> "In view of the long history of abuse of search and seizure which led to the Fourth Amendment, I do not think it was intended to leave open an easy way to circumvent the protection it extended to the privacy of individual life. *In view of the readiness*

of zealots to ride roughshod over claims of privacy for any ends that impress them as socially desirable, we should not make inroads on the rights protected by this Amendment. The fair implication of the Constitution is that no search of premises, as such, is reasonable except the cause for it be approved and the limits of it fixed and the scope of it particularly defined by a disinterested magistrate. If these conditions are necessary limitations on a court's power expressly to authorize a search, it would not seem that they should be entirely dispensed with because a magistrate has issued a warrant which contains no express authorization to search at all.

"Of course, this, like each of our constitutional guaranties, often may afford a shelter for criminals. But the forefathers thought this was not too great a price to pay for that decent privacy of home, papers and effects which is indispensable to individual dignity and self-respect. They may have overvalued privacy, but I am not disposed to set their command at naught." (Italics added)

In the *Harris* case, as we read it, the Court divided on the question of contraband property, but there is no division or disagreement on the essential right of privacy.

In *Olmstead v. United States*, 277 U. S. 438, the famous wire tapping case, the majority of the Court held that there could not be a physical search and seizure of something that is intangible, namely, a conversation going over the wire. We are not concerned here with that question because there was a physical search and a physical seizure of the doctor's private books. Mr. Justice Brandeis, in a dissenting opinion, discusses the importance of the Fourth Amendment as a necessary protection for the right of free men:

"The protection guaranteed by the amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a

part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone —the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

"Applying to the Fourth and Fifth Amendments the established rule of construction, the defendants' objections to the evidence obtained by wire tapping must, in my opinion be sustained. It is, of course, immaterial where the physical connection with the telephone wires leading into the defendants' premises was made. And it is also immaterial that the intrusion was in aid of law enforcement." (pp. 478 and 479 of 277 U. S.).

The essential privacy of a doctor's books is forcibly stated by Mr. Justice Brandeis at page 487 of 277 U. S.:

"Telephones are used generally for transmission of messages concerning official, social, business and *personal affairs including communications that are private and privileged—those between physician and patient; lawyer and client, parent and child, husband and wife.*" (Italics added).

In the same dissenting opinion, Mr. Justice Brandeis stated,

"The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding." (page 479 of 277 U. S.).

In *Interstate Commerce Comm. v. Brimson*, 154 U. S. 447, 478-479. This Court speaking through Mr. Justice Harlan said:

> "We do not overlook these constitutional limitations which, for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress. Neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen. *Kilbourn v. Thompson*, 103 U. S. 168, 190. We said in Boyd v. United States, 116 U. S. 616, 630,—and it cannot be too often repeated,—that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of his life. As said by Mr. Justice Field in In re Pacific Railway Commission, 32 Fed. Rep. 241, 250, 'of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. *Without the enjoyment of this right, all others would lose half their value.*'" (Italics added)

In *Feldman v. United States*, 322 U. S. 487, 489-490; this Court said:

> "The effective enforcement of a well designed penal code is of course indispensable for social security. But the Bill of Rights was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed. We are immediately concerned with the Fourth and Fifth Amendments, intertwined

as they are, and expressing as they do supplementing phases of the same constitutional purpose—*to maintain inviolate large areas of personal privacy.* See Boyd v. United States, 116 U. S. 616, 630. 'The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles [of the Fourth and Fifth Amendments] established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.'" (Italics added)

D. An unreasonable search and seizure is a violation of the due process clause under the rule of Twining v. New Jersey, supra.

1. *Freedom from search and seizure without warrant is a basic right of Englishmen dating back to Magna Charta.*

In *Twining v. New Jersey, supra*, p. 100, the first test of what constitutes due process is stated as follows:

"First. What is due process of law may be ascertained by an examination of those *settled usages and modes of proceedings* existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." (Italics added).

We think that it already appears from this brief that the right of privacy was deeply rooted into the traditions and usages of England before the immigration. Lord Chatham's famous dictum as to the sanctity of a man's cottage is part of the folklore of the English speaking people.

It is thought that the rule in English law against search and seizure without warrant derives from the provisions of Magna Charta (c. 39):[1]

[1] Stimson, The Law of Federal and State Constitutions, p. 46.

> "No freeman shall be taken or imprisoned, or disseised, or outlawed or exiled, or anywise destroyed, nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers, or by the law of the land." (cited in *Twining v. New Jersey, supra*, p. 100).

The search warrant for stolen goods was of ancient origin. 34 Harv. Law Rev. 362. But Lord Coke held that the practice of issuing search warrants by justices of the peace was contrary to the principles of Magna Charta:

> "For justices of the peace to make warrants upon surmises, for breaking the houses of any subjects to search for felons or stolen goods, is against Magna Charta." Institutes, Bk. 4, pp. 176, 177 cited in *People ex rel Simpson v. Kempner*, 208 N. Y. 16, 20; 101 N. E. 794.

Under the Stuarts the use of search warrants was no longer confined to the recovery of stolen goods, but was perverted to uncover evidence of sedition and treason.[2] This practice was continued until it was struck down by Lord Camden in 1765 in the famous case of *Entick v. Carrington*, 19 How. St. Tr. 1029. It is clear from Lord Camden's opinion that he was enunciating no new principle of law, but rather was sweeping away the refuse of the Star Chamber from ancient constitutional doctrine. In comparing the seizure of stolen goods and the seizure of documentary evidence, he said:

> "'The case of searching for stolen goods crept into the law by imperceptible practice. No less a person than my Lord Coke denied its legality, 4 Inst. 176; and, therefore, if the two cases resembled each other more than they do, *we have no right, without an act of Parliament, to adopt a new practice in the criminal law, which was never yet allowed from all antiquity.* Observe, too, the caution with which the law proceeds in this singular case. There must be a full charge upon oath of a theft commit-

[2] Trial of Algernon Sidney for High Treason, 9 How. St. Tr. 818, (1683).

ted. The owner must swear that the goods are lodged in such a place. He must attend at the execution of the warrant, to show them to the officer, who must see that they answer the description . . . ." (Cited in *Boyd v. United States, supra*, p. 628; italics added.)

2. *The rule against search and seizure is substantive and fundamental rather than procedural.*

We turn to the next rule of the *Twining* case, *supra*:

> "Second. It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practiced by our ancestors, is an essential element of due process of law." (p. 101 of 211 U. S.)

Under no possible construction can the right against unlawful search and seizure be termed "procedural." In speaking of Lord Camden's judgment in *Entick v. Carrington, supra*, Mr. Justice Bradley said in the *Boyd* case, *supra*, p. 630:

> "The principles laid down in this opinion affect *the very essence of constitutional liberty and security.*" (Italics added).

It is submitted that constitutional liberty cannot be preserved, if the agents of government are permitted to seize a man's private papers without warrant.

> "'Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and, therefore, it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of so-

ciety." *Entick v. Carrington, supra*, cited in *Boyd v. United States, supra*, (pp. 627, 628 of 116 U. S.).

The rule against search and seizure goes much deeper than a mere matter of procedure. It protects a basic essential right, *the right of privacy*. That right is squarely within the third conclusion of this Court in the *Twining* case, *supra*, which we shall next consider:

3. *The rule against search and seizure is a basic safeguard against arbitrary actions by the government and as such is an inherent feature of the concept of due process of law.*

"Third." But, consistently with the requirements of due process, no change in ancient procedure can be made which disregards those *fundamental principles, to be ascertained from time to time by judicial action*, which have relation to process of law, and protect the citizen in his private right, and *guard him against the arbitrary action of government.*" *Twining v. New Jersey*, p. 101 of 211 U.S. (Italics added).

In *Jones v. Securities and Exchange Commission*, 297 U. S. 1, 24, this Court speaking through Mr. Justice Sutherland said:

"The action of the commission finds no support in right principle or in law. It is wholly unreasonable and arbitrary. It violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest—that this shall be a government of laws—*because to the precise extent that the mere will of an official or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy.* Against the threat of such a contingency the courts have always been vigilant, and, if they are to perform their constitutional duties in the future, must never cease to be vigilant, to detect and turn aside the danger at its beginning." (Italics added).

Mr. Justice Cardozo in his dissenting opinion said:

> "The opinion of the court reminds us of the dangers that wait upon the abuse of power by officialdom unchained. The warning is so fraught with truth that it can never be untimely." (p. 32 of 297 U. S.).

An administrative agency or commission exercising judicial powers must proceed in accordance with standards fixed by law; otherwise, its action is violative of due process. That is precisely the reason why a search and seizure without search warrant specifically describing the place to be searched and the person or thing to be seized is an unreasonable search violative of the Constitution. Unless police officers are kept within strict bounds in conducting searches and seizures, their only guide is their free and unfettered will. They may search for such books as their unbridled zeal directs, and they may seize as many as they feel will answer their purpose. They may examine at their leisure private books and records and obtain a list of the physician's patients. They may, as their arbitrary will dictates, seek out any number of patients that they wish and force them to divulge their most intimate affairs. A government of laws means that the citizen will not violate the laws of his government, but it also means that the government will not violate the *rights of its citizens*. When police officers flout the laws of their government, it is anarchy and anarchy always ends in despotism.

In *United States v. Lefkowitz*, 285 U. S. 452, 464, this Court speaking in a unanimous opinion through Mr. Justice Butler said:

> "The authority of officers to search one's house or place of business contemporaneously with his lawful arrest therein upon a valid warrant of arrest certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained. Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible

under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests."

The matter is conclusively settled in the decision of *Johnson v. United States*, 333 U. S. 10, 13, 14:

"The point of the Fourth Amendment which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's home secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.

"[To sanction arbitrary search and seizure by police officers] *would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law.*" (333 U. S. 17; italics added).

It was held in the *Boyd* case, *supra*, that "any compulsory discovery by extorting the party's oath or compelling the production of his private books and

papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." *Boyd v. United States*, *supra*, p. 631 of 116 U. S.

And in *Weeks v. United States*, 232 U. S. 383, this Court again classified the rule against search and seizure as a basic element of a constitutional democracy. The Court quoted Cooley's Constitutional Limitations:

> "'The maxim that 'every man's house is his castle' is made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizen.'" (232 U. S. 390).

But the right of a citizen to be free from wrongful search and seizure by the federal government is of little value if he may be subjected to arbitrary raids by the officials of the forty-eight state governments.

Abuse of the search and seizure power by local police officers was noted by the President's Committee on Civil Rights as one of the ways in which people of racial minorities are deprived of their civil rights in this country:

> "In various localities, scattered throughout the country, unprofessional or undisciplined police, while avoiding brutality, fail to recognize and to safeguard the civil rights of citizenry. Insensitve to the necessary limits of policy authority, untrained officers frequently overstep the bounds of their proper duties. At times this appears in unwarranted arrests, unduly prolonged detention before arraignment, and abuse of the search and seizure power." *Findings and Recommendations of President's Committee on Civil Rights*, Part II (1).

The fact that the constitutions of every one of the forty-eight states contain provisions guarding against un-

reasonable search and seizure is cogent proof that this basic freedom is "an indispensable need for a democratic society." *Harris v. United States*, 331 U. S. 145, 161, dissenting opinion of Mr. Justice Frankfurter.

That security against arbitrary search and seizure is a basic requirement of a free society is recognized not only by the people of this country, but also by the other democratic nations of the world. The Commission on Human Rights of the United Nations, meeting at Geneva in December, 1947, unanimously adopted (Russia abstaining) a Draft Declaration on Human Rights which contained a comprehensive provision for the protection of the individual's privacy:

> "Article 9. Everyone shall be entitled to protection under law from unreasonable interference with his reputation, his privacy, and his family. His home and correspondence shall be inviolable."[*]

II. *The Search and Seizure in This Case Was Unreasonable and Violated the Due Process Clause of the Fourteenth Amendment.*

We submit that the action of the officers in the instant case was arbitrary in the highest degree, and that petitioner is entitled to the protection of this Court against such arbitrary governmental action by virtue of the due process clause of the Fourteenth Amendment. The search and seizure in this case was not only arbitrary and unreasonable, but shockingly indecent. In several of the cases cited in this brief, the Court was divided on the question of whether the seizure of contraband articles was valid. See *Harris v. United States, supra*, and *Davis v. United States*, 328 U. S. 582. No such question arises here. Ordinary books and records kept by a physician in the course of his professional work have no value to an arresting officer, except as evidence. The search for evidence, unless it is an instrument or fruit of crime, has always been declared to be an unreasonable search within the meaning of the Constitution. See *Gouled v. United States*, 255 U. S. 298, *Davis v. United States*, 328

[*] Preliminary Report by Professor H. Lauterpacht, Commission on Human Rights, Third Session, International Law Association.

U. S. 582, *Zap v. United States*, 328 U. S. 624; *Harris v. United States*, *supra*, and *United States v. Lefkowitz*, *supra*.

The search here was exploratory. The officers said that they were instructed to go down and pick up the records (17 R. 12-14; 18 R. 28). One book was on the table and one book was on the side case (17 R. 12; 18 R. 28, 29). They seized the books, made a partial examination in the office, but continued the examination later (17 R. 14). The books were still the books of the petitioner, although they were in the possession of the officers. The examination of the books made by them after they left the office is part of the same general search that was commenced in the office. So, we have here a general exploratory search designed and intended to obtain evidence. In addition to this, the search was indecent. A thing that is indecent cannot be reasonable. It has rarely happened, if ever, that law officers raided a doctor's office, seized his private records, thoroughly examined them, and then searched out his female patients, one by one, and forced them to expose their most intimate personal affairs.

One is reminded of the story of the sinning woman brought before the Master. The mob cried, "Stone her." The officers in this case, did not believe in physical stoning, but were more refined and modernistic. "Cooperation" was extorted from these helpless women by threatening them with a forced ride in the patrol wagon (18 R. 32).

In the early days of the common law when it became necessary to inquire into the physical condition of a woman prisoner a writ *De Ventre Inspiciendo* was directed to a discreet matron (1 Blackstone Comm. 456). It might be that in a police state, male law enforcement officers would be authorized to conduct a forced inquisition into the intimate affairs of a woman. But in this country when a woman becomes involved in the toils of the law, she is guarded and cared for by officers of her own sex. This case is unprecedented in American Jurisprudence. (See *People v. Martin*, 382 Ill. 192, 46 N.E. (2d) 997, and *People v. Schmoll*, 383 Ill. 280, 48 N.E. (2d). 993). The Supreme Court of Colorado in its opinion states that the privacy that attends

the physician and patient relationship is "solely for the protection of the patient, not the physician." (17 R. 53). But assuming that to be true, nevertheless, the physician is the keeper of his patient's secrets. The patient cannot be protected if police officers have the right to forcibly seize the doctor's books and search out the patients and compel them to reveal the cause of their seeking medical service. However, the distinction is purely technical and cannot affect the substantive right involved. It was the private books of the physician that were searched and seized. We believe that the same cannot be justified on any reasonable theory, legal or moral. The shocking indecency of the entire procedure aggravates the wrong and illustrates the length to which police officers will go when stealthy encroachments on constitutional rights are winked at.

The Supreme Court of Colorado does not minimize the importance of the search and seizure clauses of the Federal and state constitutions:

> "It seems superfluous to add that nothing here or heretofore said by us and nothing contained in any of the numerous decisions of other jurisdictions in support of the rule in the Massantonio case, justifies unlawful searches or seizures. In line with such jurisdictions we have condemned them in the strongest terms and pointed out the proper remedy." (17 R. 55).

The opinion of the Court in No. 17 on the constitutional issue is expressly adopted in No. 18 (18 R. 69). The Massantonio case referred to by the Colorado Court is *Massantonio v. The People*, 77 Colo. 392, 236 P. 1019. In that case the Colorado Supreme Court said:

> "We cannot leave this subject, however, without noticing the following paragraph of the brief of the Attorney General:
>
> 'We feel that the decision on this point is of great importance as it directly affects the powers of the law enforcing officers and if the contention of our opponents is upheld the hands of these officers will be tied and one more technicality will be thrown up to delay and

prevent the apprehension and conviction of criminals. It might be well to observe what would be the effect of such a rule. Evidence secretly and surreptitiously obtained would be inadmissible. Thieves could rest secure in their homes, knowing that it would be next to impossible to be taken by surprise, and the bootlegger would have little fear of a sudden onslaught by the prohibition officers. * * * To hold that the peace officers must advertise both their identity and purpose to the world whenever they attempt to secure evidence is, in our opinion, to put a wholly unreasonable and illegal restriction on their powers.'

"Apparently this frankly and lucidly states the position of those who, under the guise of official authority, without a warrant of search and in defiance of the Constitution of their state, invade without hesitation the homes of its citizens and seize whatever they find which they think may be of use in a criminal prosecution; and we cannot too strongly condemn it. Every officer making an unconstitutional search, and every officer advising or conniving at such conduct is a law violator and a violator of his oath of office and should be held to accountability." (77 Colo. 400; 236 P. 1021).

So it is apparent that the Colorado Court goes right along with this Court in full appreciation of the importance of the citizen's right to enjoy the ordinary privacies of life.

The difference between the Colorado court and this Court as revealed by the respective decisions is that while an unreasonable search and seizure is recognized by the Colorado court to be unconstitutional, yet evidence obtained thereby is admissible because of a common law rule of evidence. This rule we shall hereinafter discuss.

So there is no issue here concerning the character of the search and seizure conducted against petitioner. It was not approved by the Colorado Supreme Court. It could not be approved by any tribunal in a free country.

III. *The Ruling of the Colorado Court That the Books Obtained From Petitioner by a Wrongful Search and Seizure Were Competent Evidence Against Him Is Contrary to the Due Process Clause of the Fourteenth Amendment.*

This Court is not here concerned with the delicate function of passing upon the constitutionality of a state statute claimed to be in conflict with the Federal Constitution. The observation of this Court in *Bridges v. State of California*, 314 U. S. 252, 260; is peculiarly pertinent.

> "It is to be noted at once that we have no direction by the legislature of California that publications outside the court room which comment upon a pending case in a specified manner should be punishable. As we said in Cantwell v. Connecticut, 310 U. S. 296, 307, 308, such a 'declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations.' But as we also said there, the problem is different where 'the judgment is based on a common law concept of the most general and undefined nature.' [Citing cases]. For here the legislature of California has not appraised a particular kind of situation and found a specific danger sufficiently imminent to justify a restriction on a particular kind of utterance. The judgments below, therefore, do not come to us encased in the armor wrought by prior legislative deliberation. Under such circumstances, this court has said that 'it must necessarily be found,' as an original question' that the specified publications involved created 'such likelihood of bringing about the substantive evil as to deprive [them] of the constitutional protection.'"

Nearly a century after the adoption of the Fourth Amendment the free people of Colorado re-wrote it word for word in the Constitution of Colorado, (Article 2, Section 7). No statesman, journalist, jurist or citizen has at any time questioned the wisdom of the search and seizure clause, or suggested the slightest modification thereof. At no time since the adoption of the Colorado Constitution did the legislature ever take any action that in the slightest degree evinced an intention to modify the mandatory provision of the Colo-

rado Constitution as to search and seizure. Under the Colorado statutes a warrant authorizing a search and seizure can be obtained only by a sworn complaint.[4]

Let us consider briefly the rule of evidence which the Colorado court relies on. We quote from the decision of the court in the *Massantonio* case, supra, which is relied on by the court in its opinion in this case under the rule of *stare decicis* (17 R. 54):

> "The general principle is thus stated by Greenleaf:
>
> 'Though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question.' Greenleaf on Evidence (15th Ed.) Vol. 1, p. 348, Sec. 254," (77 Colo. 396; 236 P. 1020).

Greenleaf's rule is also referred to by Mr. Chief Justice Taft in *Olmstead v. United States*, *supra*, in which he quotes *Jones on Evidence*, which authority comments on Greenleaf's rule as follows:

> "Where there is no violation of a constitutional guaranty, the verity of the above statement is absolute" (page 467 of 277 U. S.).

There is a distinction in securing papers or records by *private trespass* and obtaining them by *official maladministration* in direct violation of a constitutional guarantee. This important distinction, the Supreme Court of Colorado, following *Wigmore on Evidence*, completely overlooks. Professor Wigmore completely misconceives the function of the Fourth Amendment. He says the object of the Amendment was to protect the citizen from domestic disturbance by the disorderly intrusion of irresponsible administrative officials.

[4] 1935 C.S.A. Ch. 48, Sec. 431; 1935 C.S.A. Ch. 89, Sec. 45; 1935 C.S.A. Ch. 48, Sec. 219, and 1935 C.S.A. Ch. 48, Sec. 252.

(8 *Wigmore on Evidence* 35 (3rd ed.)). If this were so, nice officers with polished manners and gentlemanly bearing could violate the Constitution with impunity. The Fourth Amendment was designed to protect the citizen against *government oppression* and not *private trespass*. The entire Bill of Rights is directed against the government and not against the private citizen, but in his behalf and for his benefit. Wigmore's argument to the contrary is puerile dialectics.

The Colorado Court further quotes from Wigmore, referring to his illustration of the infernal machine (77 Colo. 397, 236 P. 1020). But the remote possibility that someone may have an infernal machine could not justify the unlawful search of one who, for example, might be suspected of possessing a bottle of illicit liquor. Hyperbole serves a useful purpose as a figure of speech, but is out of place in the adjudication of human rights. The Supreme Court of Missouri comments on Professor Wigmore's argument:

> "Prof. Wigmore thus characterizes that argument: 'All this is misguided sentimentality.' The state copies that cynical characterization. We think Prof. Wigmore in his essay has not shown his usual logical force and clearness.
>
> "If the rule obtains that an officer may enter any house and search any person any place without a warrant or knowledge; if he, vain-gloriously sensible of the little brief authority with which he is invested, is encouraged to arrest and search because he suspects some one of some unknown crime and is rewarded according to his success in discovery, encouraged to hunt and ferret on a chance of hitting upon something suspicious, *a system of espionage would ensue characteristic of those countries where the sanctity of the home and inviolability of the citizen are unknown and official interference in those matters is the common experience.*
>
> "It is an incident of every reform that enthusiasts, without experience, and with rapt vision of a glorious result, forget or ignore the limit of legitimate method, disdain conventional restraints and regular

processes, through which alone permanent progress can be achieved. It is a state of mind which causes violent reaction rather than steady progress toward the end desired. It is for the courts, where their offices are invoked, to temper excess by enforcing the restraints which the law imposes for the peaceful orderly conduct of affairs. The lack of discrimination arising from this enthusiasm is illustrated by this argument of Prof. Wigmore's:

"'If officials illegally searching come across an infernal machine planned for the city's destruction and impound it, shall we assume that the diabolical owner of it may appear in court and demand its return and be ordered by the court restitution with perhaps an apology for the 'outrage'?"

"Here is a hapless confusion of claim to property with admissibility of evidence. Violence of statement is not force of reasoning. We are concerned with evidence in a misdemeanor case, and it is beside the question to talk of arson, murder, and treason." (Italics added). *State v. Owens*, 302 Mo. 348, 378, 379, 259 S. W. 100, 109.

The following from Professor Wigmore's argument should also be noted:

"Meanwhile, the heretical influence of Weeks v. United States spread, and evoked a contagion of sentimentality in some of the State Courts inducing them to break loose from long-settled fundamentals.

"In this last period, most of the effect may be ascribed to the temporary recrudescense of *individualistic sentimentality for freedom of speech and conscience*, stimulated by the stern repressive war-measures against treason, disloyalty and sedition, in the years 1917-1919. In a certain type of mind, it was impossible to realize the vital necessity of temporarily subordinating the exercise of ordinary civic freedom during a bloody struggle for national safety and existence. In resistance to these war-measures, it was nat-

ural for the misguided pacifistic or semi-pro German interests to invoke the protection of the Fourth Amendment. Thus invoked and made prominent, all its ancient prestige was revived and sentimentality misapplied. In such a situation, the always watchful forces of criminality, fraud, anarchy, and law evasion perceived the advantage and made vigorous use of it. After the enactment of the Eighteenth Amendment and its auxiliary legislation, prohibiting the sale of intoxicating liquors, a new and popular occasion was afforded for the misplaced invocation of this principle; and the judicial excesses of many Courts in sanctioning its use give an impression of easy complaisance which would be ludicrous if it were not so dangerous to the general respect for law and order in the community.

"No doubt a stage of saturation had to be reached before this period of misuse of the Fourth Amendment could come to a close." (8 *Wigmore on Evidence*, pp. 32-34; 3rd ed.) (Italics added).

A law writer who talks about freedom of speech and freedom of conscience as mere "individualistic sentimentality" betrays a complete misunderstanding of the indispensable rights of a democracy. At the time Professor Wigmore wrote, the epochal decisions in *Near v. Minnesota*, 283 U. S. 697; *Lovell v. City of Griffin*, 303 U. S. 444, *Thornhill v. Alabama*, 310 U. S. 88; and *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, had not been written.

It suffices to say that at no time since the independence of the United States was established has freedom of speech and conscience been regarded as mere "individualistic sentimentality." Therefore, Wigmore's approach to the constitutional problem here involved is definitely wrong and it is inevitable that his conclusion is wrong. Then there is the argument of necessity,—that is, that the basic constitutional rights may be ruthlessly violated to the end that the criminal code may be enforced. In the recent case of *United States v. DiRe*, 332 U. S. 581, 595, we find a sufficient answer to this argument:

"We meet in this case, as in many, the appeal to necessity. It is said that if such arrest and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them. The conviction based on evidence so obtained cannot stand."

And in *Weeks v. United States*, *supra*, (232 U. S. 383, 393) it was said:

"If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."

If the right to privacy against unreasonable search and seizure is protected by the Fourteenth Amendment, it necessarily follows that the vindication of that right is within the federal power. This Court has completely rejected the idea advanced by the Colorado Supreme Court that a civil suit for damages is the only remedy, and it has consistently ruled that evidence obtained by an unlawful search and seizure cannot be availed of by the government. In *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 391, this Court said:

"The Government now, while in form repudiating and condemning the illegal seizure, seeks to maintain

its right to avail itself of the knowledge obtained by that means, which otherwise it would not have had.

"The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. Weeks v. United States, 232 U. S. 383, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. [Citing cases]. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."

See also *Weeks v. United States, supra, Olmstead v. United States, supra,* and *Johnson v. United States, supra.* In *Trupiano v. United States,* 334 U. S. .....; 68 S. Ct. 1229, decided by this Court on June 14, 1948, this Court held that even contraband liquor could not be seized without warrant where it is practicable to obtain a warrant.

In the case at bar no warrant could be obtained for the reason that no judge or magistrate would issue a warrant directing that a doctor's private books and records be searched and seized. Further, the officers could not make an affidavit describing the books or records which they wanted to seize because it was necessary that they first make a search in order to find that which they wanted. In a dissenting opinion Mr. Justice Wiest in *People v. Case,* 220 Mich. 379, 404; 190 N.W. 289, 297, 298, makes this pertinent observation:

"Suppose an officer scans the information he has and finds it insufficient to obtain a warrant and goes ahead without a warrant, shall the test of the lawfulness of his act be had without any reference to the provision, with the requirements of which he knew he could not lawfully comply? It is absurd to think of such a thing. The argument that if the officer finds the defendant in possession of intoxicating liquor this constitutes probable cause for making the search was urged over a hundred years ago and disallowed by the English courts."

"If no such warrants can be issued can any police officer act as though he had a general warrant. Most emphatically no. What earthly sense is there in outlawing general warrants and then permitting police officers to act as though they had a general warrant? No law, common or statute, can give police officers general power of search and seizure."

The opinion from which the above excerpts are taken is very instructive, both from a historical and legal viewpoint.

In the *Palko* case, *supra*, Mr. Justice Cardozo said that "ordered liberty" was implicit in the concept of due process. Order necessarily means law, a rule of conduct, an established principle which is applied to concrete situations by someone exercising the functions of a magistrate or judge. But as already observed, in the case of search and seizure without magisterial intervention, the raiding officers are a law unto themselves. The absolute necessity of the intervention of magisterial authority is forcibly stated in *Johnson v. United States, supra*, and *United States v. Lefkowitz, supra*.

A long time ago it was stated that laws are made for men and not men for the law. This is especially true of the Bill of Rights. The Fourth Amendment protects the citizen against the Federal Government. It is equally important that the citizen be protected against the tyranny and oppression of state governments. It matters little whether

the invasion of a man's freedom is directed by federal officers or state officers; therefore, the Fourteenth Amendment with its guarantee of due process was inevitable. The Fourteenth Amendment is the complement of the Bill of Rights, and together they constitute the American Magna Charta of human rights.

Respectfully submitted,

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1947.

No. 583.

JULIUS A. WOLF, PETITIONER,

v.

THE PEOPLE OF THE STATE OF COLORADO, RESPONDENT.

No. 584.

JULIUS A. WOLF, PETITIONER,

v.

THE PEOPLE OF THE STATE OF COLORADO, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1947.

No. 593.

JULIUS A. WOLF, PETITIONER,

v.

THE PEOPLE OF THE STATE OF COLORADO, RESPONDENT.

No. 594.

JULIUS A. WOLF, PETITIONER,

v.

THE PEOPLE OF THE STATE OF COLORADO, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

REPLY BRIEF OF PETITIONER.

THE PROTECTION OF THE CONSTITUTION AGAINST UNLAWFUL SEARCH AND SEIZURE WAS PROPERLY INVOKED IN THE STATE COURTS.

It is asserted by the Attorney General of Colorado that petitioner did not claim the protection of the fourteenth amendment except by supplemental assignments of error. He admits, however, that in both the district court and the state supreme court petitioner invoked the protection of the fourth amendment to the constitution on the ground that

there was an unreasonable search and seizure of petitioner's books and records.

It is our position that the protection of the fourth amendment is made effective against state action by the fourteenth amendment. If that be correct—and that is the only question in the case—then petitioner adequately asserted his constitutional defense by invoking the fourth amendment. Prior to the adoption of the fourteenth amendment, the fourth amendment only applied to action by the federal government; but after the adoption of the fourteenth amendment, the right of privacy was guaranteed against both federal and state action.

The constitutional immunity against search and seizure is of the utmost importance. Constitutional rights cannot be frittered away by such an attenuated procedural objection that the wrong amendment was designated. It is customarily and properly said that the right of free speech is protected by the first amendment. This is another way of saying that the first amendment has been made effective against state action by virtue of the fourteenth amendment. And it is just as proper to say that the fourth amendment, by virtue of the fourteenth amendment, protects the individual against unreasonable search and seizure by state officials.

It is admitted by the Attorney General that before the argument in the state supreme court a supplemental assignment was filed specifically setting up the fourteenth amendment. The Attorney General says that the Supreme Court denied petitioner's motion to file such supplemental assignment because it came too late to be considered by the appellate court (Page 40 of respondent's brief). The record does not show that the court gave any reasons for denying petitioner the right to file supplemental assignments of error. The only things that the record shows are the objections of the Attorney General (R. 66; Case No. 594). The basis of the objections was that the question which was sought to be raised in the supplemental assignment of error had already been raised in the original assignment of error. The original assignment had invoked the protection of the fourth amendment. It is inconsistent for the Attorney General to tell this court that the assignments came too late.

when it appears from the record that the only objection that was made by the Attorney General to such assignments was that they had already been covered.

The fact that the Colorado court did not refer to the federal constitution in its opinion does not affect the jurisdiction of this court. In the case of *Bob-Lo Excursion Co. v. People of State of Michigan*, decided February 2, 1948, and reported in 68 S. Ct. 358, Advance Sheet No. 6, under date of February 15, 1948, in the footnote on page 361, this court said:

> "The Michigan Supreme Court did not refer explicitly in its opinion to appellant's Fourteenth Amendment contentions, but the record shows they were presented to that court in the assignments of error on appeal and were therefore necessarily rejected by its affirmance of the judgment of the Recorder's Court."

In the case of *Musser v. State of Utah*, decided by this court on February 9, 1948, reported in 68 S. Ct. 397, this court stated:

> "On argument in this court, inquiries from the bench suggested a federal question which had not been specifically assigned by defendants in this court, nor in any court below, although general transgression of the Fourteenth Amendment had been alleged."

Since the court was concerned with whether or not the fourteenth amendment was violated, the court vacated the judgment and remanded the case to the state court so that the matter could be clarified.

THE UNLAWFUL SEARCH AND SEIZURE OF PETITIONER'S BOOKS CANNOT BE JUSTIFIED AS AN INCIDENT TO A LAWFUL ARREST.

It is admitted by the respondent that there was no search warrant or other order of court upon which the search and seizure could be justified. Now, it is sought to justify the seizure because of the lawful arrest. That question, while raised in the state court, was not considered or decided by it. Further, the search and seizure was exploratory and general

as pointed out in the original brief. A lawful arrest does not justify an unlawful search or seizure. See *Olmstead v. United States*, 277 U. S. 438, 464; *Boyd v. United States*, 116 U. S. 616, 641;; *Takahashi v. United States*, 143 F. (2d) 118, 123 (C. C. A. 9th), and *Agnello v. United States*, 269 U. S. 20.

In *Johnson v. United States*, decided Dec. 18, 1947, 68 S. Ct. 367, 369, this Court said:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent."

It has been settled by the decisions of this Court that the only things that may be seized incident to a lawful arrest are contraband articles which it is unlawful to possess or the instruments, tools, or fruits of crime. See *Harris v. United States*, —— U. S. ——, 67 S. Ct. 1098, and *Lefkowitz v. United States*, 285 U. S. 452.

It is also suggested in respondent's brief that the officers did not make any unlawful search because the books were on the doctor's desk in plain view. The answer to this contention is that the citizen does not lose his right to privacy or his immunity from police surveillance because he does not keep his personal books and records under lock and key.

> "The effective enforcement of a well designed penal code is of course indispensable for social security. But the Bill of Rights was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed. We are immediately concerned with the Fourth and Fifth Amendments, intertwined as they are, and expressing as they do supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy."
>
> *Feldman v. United States*, 322 U. S. 487, 489, 490; 64 S. Ct. 1082, 1083.

Respondent cites numerous cases in which a search and seizure was upheld as incident to a lawful arrest, but an examination of those cases will disclose that the thing seized was contraband, or the fruits or means of crime.

The decision of the Colorado Supreme Court in this case is not based upon the question of lawful or unlawful arrest. The Colorado Court in the original Massantonio case, 77 Colo. 392; 236 P. 1019 upon which the present decision rests, recognizes that there is a division in the authorities, and that the federal rule is different from the state rule. The clear implication of the decision is that under the federal rule this search and seizure would be unconstitutional. Indeed, the Colorado Court does not hold expressly or by implication that the search and seizure in this case was constitutional. On the contrary, it expressly and severely condemns such search and seizure.

> "Every officer making an Unconstitutional search, and every officer advising or conniving at such conduct

is a law violator and a violator of his oath of office and should be held to accountability."

Massantonio v. People, 77 Colo. 392; 400; 236 P. 1019.

The Attorney General does not discuss the cases which we have cited in our opening brief to the point that immunity from search and seizure is a basic right in a free society; that the citizen is entitled to protection against the surveillance of police officers; that in a free government there is an inviolate right to privacy; that if officers of the law have the right to make general and explorary searches and seizures, there can be no ordered liberty or civilized government, or as expressed by Mr. Justice Jackson in *Johnson v. United States, supra*, that abritrary search and seizure "would obliterate one of the most fundamental distinctions between our form of government where officers are under the law, and the police-state where they are the law." (Pages 370-371 of 68 Ct.)

The argument of the Attorney General is wholly out of line with the decision of the Colorado court. The Attorney General argues that the search and seizure was reasonable. The Colorado court definitely holds to the contrary. The Colorado court would remit the persons whose fundamental rights have been violated to independent court action, but it is submitted that the practice of a police state, which is wholly contrary to the spirit of American freedom, can only be successfully stopped if the courts shut the door to evidence unconstitutionally obtained. The police officers will continue to violate the Constitution as long as courts receive evidence obtained in violation of constitutional rights.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1948.

No. 17.

JULIUS A. WOLF, PETITIONER,

v.

THE PEOPLE OF THE STATE OF COLORADO.

No. 18.

JULIUS A. WOLF, PETITIONER,

v.

THE PEOPLE OF THE STATE OF COLORADO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO.

REPLY BRIEF OF PETITIONER.

ASSUMING THAT PETITIONER'S ARREST WAS LAWFUL, STILL THE SEARCH AND SEIZURE OF PETITIONER'S BOOKS CONSTITUTED AN UNREASONABLE SEARCH AND SEIZURE.

It is contended by Respondent that the search and seizure was reasonable because it was incident to a lawful arrest. If we concede that the arrest was lawful, nevertheless that does not give an officer the right to make an unreasonable search and seizure. "The mere fact that there is a

valid arrest, does not *ipso facto* legalize a search or seizure without a warrant." *Trupiano v. United States*, 334 U. S. 669, 708.

The right of search and seizure as incident to a lawful arrest, this Court said in the above case, "grows out of the inherent necessities of the situation at the time of the arrest" (p. 708). Here, there was no such necessity. The officers who went to the doctor's office to get evidence had ample time to get a search warrant, but their difficulty was that no court would issue a warrant to search and seize a doctor's professional books. Furthermore, the officers did not know whether there were any books, where the books were, or what they contained. Hence, it would be impossible to make the affidavit specifically describing the thing to be seized or the place to be searched. Surely, it cannot be successfully argued that because it was legally and constitutionally impossible to obtain a search warrant, that, therefore, a warrant could be dispensed with.

Only where the articles seized are contraband is a search or seizure without warrant justified. *United States v. Lefkowitz*, 285 U. S. 452, *Davis v. United States*, 328 U. S. 582, *Harris v. United States*, 331 U. S. 145. Here the articles seized were of a purely evidentiary nature—the private records of a physician. The Colorado court does not condone the seizure, but holds that the records are admissible in evidence notwithstanding that they were unlawfully obtained (17 R. 54, 55).

In *Harris v. United States*, 331 U. S. 145, 154, this Court stated:

> "This Court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected and property the possession of which is a crime. [Citing cases]."

Respondent urges that the federal Constitution may be violated by state officers because of a rule of evidence and because of "necessity." We maintain this is manifestly erroneous. Numerous decisions of this Court make it clear that neither a rule of evidence nor the plea of necessity justifies the violation of a Constitutional right. We will refer to these decisions further on in this brief. Respondent quotes from the decision of *Carroll v. United States*, 267 U. S. 132. The excerpt from that decision cited in respondent's brief does not reveal the true holding of the Court. It omitted the words:

> "* * * that an automobile or other vehicle contains that which by law is subject to seizure and destruction * * *"

This language omitted from the quotation in the Respondent's brief completely changes the significance of the decision. We are not concerned here with the right to search an automobile or any other vehicle. Furthermore, the doctrine enunciated in the *Carroll* case was specifically limited to search and seizure under the National Prohibition Act by the subsequent decision of this Court in *United States v. DiRe*, 332 U. S. 581.

THE ABSENCE OF FORCE DOES NOT MAKE AN UNREASONABLE SEARCH AND SEIZURE LAWFUL.

It is next contended by Respondent that the officers in this case did not engage in an exploratory search because there was no breaking of locks, rummaging through drawers, or opening of closed receptacles, and no force of any kind. The officers were very meticulous to say that they merely picked up the books under the instruction to "get the evidence" (17 R. 11-14). This euphemism does not change the fact that there was both a search and seizure. Certainly, a man does not lose the right of privacy because he does not constantly keep his books under lock and key, any more than a householder would be precluded from complaining of theft because he left his door unlocked. Petitioner's Constitutional right was not lost because he had his books on his desk in his private office.

In *Trupiano v. United States*, 334 U. S. 669, 707, this Court said:

> "Moreover, the proximity of the contraband property to the person of Antoniole at the moment of his arrest was a fortuitous circumstance which was inadequate to legalize the seizure."

We also submit that there was a rummaging and searching of petitioner's books both in his private office, as well as on the outside (17 R. 12-14). As to the absence of force which is suggested by the Attorney General, we say that the petitioner did not lose his Constitutional right because he did not resist four officers of the law who had the potential force to do what they wanted to do. They were there to get the evidence and they had the power to get it regardless of any resistance that petitioner might have offered. *United States v. DiRe, supra*

THE FACT THAT THE BOOKS WERE VISIBLE TO THE OFFICERS DID NOT JUSTIFY THEIR SEIZURE.

It is contended by Respondent that because the books were lying in plain sight on a table and on a book case in petitioner's private office that they were subject to seizure as an incident to petitioner's arrest. This theory is clearly contrary to the decisions of this Court. In *Trupiano v. United States*, 334 U. S. 669, 708, the Court said:

> "In other words, the presence or absence of an arrestee at the exact time and place of a forseeable and anticipated seizure does not determine the validity of that seizure if it occurs without a warrant. Rather the test is the apparent need for summary seizure, a test which clearly is not satisfied by the facts before us."

That the Constitutional protection against unreasonable search and seizure extends to both searches and seizures was stated by Chief Justice Taft in the case of *Olmstead v. United States*, 277 U. S. 438, 463:

> "The well-known historical purpose of the Fourth Amendment, directed against general warrants and

writs of assistance was to prevent the use of governmental force to search a man's house, his person, his papers, and his effects, *and to prevent their seizure against his will.*" (Italics ours.)

The Circuit Court of Appeals for the ninth circuit, quoting from the concurring opinion in the *Boyd* case, points out the dual protection against both search and seizure:

> "But the authority to search cannot be confused with the authority to seize. It cannot be confused with the power to use seized articles in evidence. The Fourth Amendment prohibits unreasonable searches and seizures. The distinction has never been more carefully drawn than in the language used by Mr. Justice Miller in the concurring opinion in the case of Boyd v. United States, 116 U. S. 616, 641; 6 S. Ct. 534, 538, 29 L. Ed. 746. It is there said:
>
> "'The searches meant by the constitution were such as led to seizure when the search was successful.'
>
> "And again: '*The things here forbidden are two: search and seizure*'." (Italics ours.) Takahashi v. United States, 143 F. (2d) 118, 123, C. C. A. 9th.

THE RULE AGAINST UNREASONABLE SEARCH AND SEIZURE CANNOT BE EVADED BY RESORT TO A "RULE OF EVIDENCE."

Respondent argues that the books and the information obtained were admissible as evidence regardless of the Constitutional immunity. To which we answer that a rule of evidence cannot destroy a Constitutional right. *Truax v. Corrigan*, 257 U. S. 312, *Pollock v. Williams*, 322 U. S. 4, *Bailey v. Alabama*, 219 U. S. 219. No discussion is necessary to show that Constitutional rights would be utterly illusory if they could be nullified by a rule of evidence. It is true, as we argued in the opening brief, that the Fourteenth Amendment protects the citizen, and indeed every human being, from police invasion of the right of privacy. Our argument is based upon the proposition that this is a

right which necessarily goes with freedom and liberty. Counsel offers nothing in rebuttal.

It is true that in the Slaughter House Cases a distinction is drawn between the rights and immunities of United States citizenship and state citizenship. It is also true that the right of immunity from unreasonable search and seizure is not in the category of rights that attach to national citizenship under the doctrine of the Slaughter House Cases. But neither are freedom of conscience, speech, assembly, or the right to have counsel included in such category. It is suggested in the brief of Respondent that the protection of due process goes only to matters of procedure. More specifically, it is contended by Respondent that if there is a fair trial, adequate notice, and a day in court, due process has been satisfied. But this Court has decided that freedom of conscience, assembly, and speech, which have nothing to do with trial procedure, are guaranteed by the due process clause.

FREEDOM FROM UNREASONABLE SEARCH AND SEIZURE IS "OF THE VERY ESSENCE OF CONSTITUTIONAL LIBERTY" AND, THEREFORE, PROTECTED BY THE DUE-PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

An Associated Press dispatch from Prague published in the Denver Post under date of September 19, 1948, reports the adoption of a new Czechoslovakian "constitution." According to the dispatch, "The new constitution provides that a search and seizure may be made without a warrant if the warrant is issued within forty-eight hours." This clearly shows that search and seizure of private books and records is a necessary attribute of a totalitarian government. World opinion today, led by this country, definitely holds that the loss of freedom in Czechoslovakia, or any other country, jeopardizes our freedom here. Yet, it is contended in this Court that a citizen's Constitutional right of privacy is not jeopardized by the action of state officers who ruthlessly violate it. Under that theory the citizen would be only half free. We quote from Mr. Justice Suther-

land in the case of *Jones v. Securities and Exchange Commission*, 297 U. S. 1, 24:

> "'Arbitrary power and the rule of the Constitution cannot both exist. They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought into conflict. To borrow the words of Mr. Justice Day, 'there is no place in our constitutional system for the exercise of arbitrary power.' Garfield v. U. S. ex rel. Goldsby, 211 U. S. 249, 262, 29 S. Ct. 62, 66, 53 L. Ed. 168."

Respondent strongly relies on the case of *Marron v. United States*, 275 U. S. 192. In that case there was a continuous, open violation of the law. The articles seized in that case were taken from a saloon being operated as part of a conspiracy to violate the law. The later decisions of *Go-Bart Importing Company v. United States*, 282 U. S. 344, and *United States v. Lefkowitz*, 285 U. S. 452, limit the rule of the *Marron* case to the particular facts existing in that case. As pointed out in the case of *Davis v. United States*, 328 U. S. 582, there is a vast difference between the seizure of private records and that of records kept pursuant to the requirements of law, and subject to inspection by law enforcement officers. The books seized from petitioner's office were private, contained confidential information pertaining to petitioner's patients and were not subject to inspection by police officers. The seizure of such evidentiary matter has always been distinguished from the seizure of contraband articles or the fruits of crime. See *Davis v. United States, supra, United States v. Lefkowitz, supra.*

We quote from the case of *Gouled v. United States*, 255 U. S. 298, 303-304:

> "It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, in Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, and in Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 Sup.

Ct. 182, 64 L. Ed. 319) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two amendments [Fourth and Fifth]. The effect of the decisions cited is: That such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen—the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous, executive officers."

Respectfully submitted,

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SUPREME COURT, U.S.

BRIEF OF RESPONDENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 17

JULIUS A. WOLF, PETITIONER,

vs.

THE PEOPLE OF THE STATE OF COLORADO.

No. 18

JULIUS A. WOLF, PETITIONER,

vs.

THE PEOPLE OF THE STATE OF COLORADO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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BRIEF OF RESPONDENT

INTRODUCTION

The petitioner, in his opening brief, has correctly cited the opinions of the Supreme Court of Colorado of which he here complains, and the dates of the respective judgments.

We accept his statement concerning the jurisdiction of this court.

We also accept his statement of the constitutional question involved, except that we deny his fundamental

premise that, in this case, the right of the petitioner to be free from unreasonable search and seizure, was violated.

Counsel for the petitioner, in specifying the errors upon which they will here rely, have gravely erred in assuming that the petitioner was subjected to an unreasonable search and seizure by the investigating officers of the State of Colorado. This we emphatically deny; and, if the court sustains our position on this point, we submit that there will be no issue before the court.

If, however, the court determines that an unreasonable search and seizure occurred, it will then become necessary to determine whether or not, under the circumstances here appearing, the witnesses whose names were procured from the day books so seized, were competent to testify against the accused, and if the reception of their testimony in a state court, in a trial for violation of a state statute, constituted a denial of the rights of the petitioner under the Constitution of the United States.

With the modification above noted, we accept the specification of errors set forth by counsel for the petitioner, and, after briefly supplementing their Statement of the Case, we will proceed to answer the several arguments they have advanced.

STATEMENT OF THE CASE

For the sake of convenience, and in view of the fact that two cases are here pending, we shall adopt the procedure outlined by counsel for the petitioner and, in referring to the record in case No. 17, such reference will be indicated as 17 R..... Reference to the record in case No. 18 will be indicated as 18 R..... All references will be to the page numbers of the printed transcript.

It is true, as counsel states, that the petitioner, at all times here involved, was a licensed physician, and that he maintained his office in the City and County of Denver and State of Colorado. His co-defendant in case No. 17 was one A. H. Montgomery, a chiropractic doctor (17 R-1), while his co-defendants in case No. 18 were Charles H. Fulton, a chiropractic doctor, and Betty Fulton, the latter's wife, (18 R-1). In both cases, the defendants were charged with conspiracy to perform an abortion, the respective cases, of

course, being predicated upon separate offenses, involving different patients and committed at different times.

The alleged unlawful search and seizure of which complaint is here made was incident to an investigation concerning yet another abortion assertedly performed by this petitioner, for which he was never prosecuted. The transcripts filed here give very little information concerning this matter, merely stating that the chief investigator for the office of the District Attorney of Denver "had occasion to make an investigation regarding the activities of a woman by the name of Gertrude Martin at the Cosmopolitan Hotel" (17 R-10). The true facts, which we are sure the petitioner will not deny, are that, on April 25, 1944 Miss Martin was found in the Cosmopolitan Hotel, in Denver, seriously ill. She was immediately transferred to the Denver General Hospital where it was determined that she was suffering from an abortion. The following day, Miss Martin made a statement naming this petitioner and Dr. A. H. Montgomery as the persons who had caused her abortion. (17 R-11).

> "In other words, Mr. Humphreys, you had the two defendants (Wolf and Montgomery) arrested because of the information you received from Gertrude Martin that these two defendants had caused her abortion, is that correct? A. Yes, sir." (Parentheses supplied.)

The statement referred to was obtained from Miss Martin on April 26, 1944. The following day, April 27, Dr. Wolf was placed under arrest by a deputy sheriff of Denver, accompanied by two deputies from the office of the District Attorney, for investigation concerning this offense. (17 R-14) At the time of the arrest, two day books, one for the year 1943 and one for the year 1944, the same being designated as People's Exhibits "A" and "C" in the Wolf-Montgomery case (No. 17), and People's Exhibits "D" and "E" in the Wolf-Fulton case (No. 18) were found lying on a desk and a book case in petitioner's office (18 R-28) and taken by the arresting officers incident to the arrest. This was the "unreasonable search and seizure" which the petitioner now contends violated his rights under

the Fourth Amendment to the Constitution of the United States.

The original record is replete with the statement, often repeated, that Dr. Wolf was arrested on the complaint of Miss Martin, and that it was at the time of such arrest, and as an incident thereto that the books in question were taken by the arresting officers.

At this point, it should, we feel, be noted that the cases subsequently filed alleged that Drs. Wolf and Montgomery, on or about April 7, 1944, had unlawfully conspired to procure an abortion of one Mildred Cairo (case No. 17), and that Drs. Wolf and Fulton, on or about April 27, 1944, had unlawfully conspired to procure an abortion of one Agnes Vera Bashor (Case No. 18). The names of both women were taken from the day books removed by the arresting officers from the office of the petitioner when he was first placed under restraint, but it is significant to note that such books merely disclosed the fact that such women, and others, had been to the office of Doctor Wolf on certain days. They did not disclose the reason for such visits, the nature of the complaint from which the patient was suffering, or the treatment administered by the physician. All such information was supplied by the direct testimony of the women themselves, neither of whom claimed any right to refuse to testify on the ground of self-incrimination, nor did either contend that the testimony they freely gave was confidential.

In each case, other women who had been aborted by Dr. Wolf and one or the other of his co-defendants, depending on the case being tried, were permitted to testify to the illegal acts of the petitioner. Such evidence, however, was strictly limited to the purpose of showing plan, design and intent, and the jury was so instructed.

It should also be noted, we believe, that in the Wolf-Fulton case (No. 18) at least three of the witnesses who testified to similar offenses, i.e., Rogers, Zurcher and Gorman, were contacted because slips bearing their names and addresses were taken from the person of the defendant, Fulton, at the time of his arrest. Their identity was not ascertained from an examination of the books of this

petitioner, although such books confirmed the fact that each of them had been received and treated by him.

The facts above stated are, we believe, a sufficient supplement to the Statement of the Case set forth in Petitioner's brief.

SUMMARY OF ARGUMENT

The respondent will first contend that there was no unreasonable search and seizure in either case here at bar. We shall argue that where, as here, a law enforcement officer has reasonable grounds to suspect the commission of a felony, he has a right, if indeed not a duty, to place the suspect under arrest. Such arrest, at the risk of the officer, may be made without warrant, and reasonable seizure of pertinent evidence may be made as an incident to the arrest.

We shall further assert that the records in the instant cases refute the contention that the officers were engaged in a mere "exploratory" search for evidence, and we sincerely contend that there was no search at all of the office of the petitioner. The books taken were lying in plain sight and open view, subject to be examined by any person who desired so to do.

We contend further that, in the event the court should determine that the books were illegally seized, nevertheless, the witnesses whose names were obtained therefrom were competent to testify. The testimony itself was admissible, relavent and material. The manner in which the identity of the witnesses was established, as distinguished from the incriminating testimony given by such witnesses is not open to inquiry, and the reception of such testimony did not violate any of the constitutional rights of the petitioner.

Finally, we shall assert that each state has the inherent and inalienable right to prescribe rules of evidence to be in force and effect in its own jurisdiction where prosecution is had in a state court for violation of a state statute.

ARGUMENT

I. The Arresting Officers Were Not Guilty of an Unreasonable Search and Seizure.

In presenting our answers to the arguments of counsel for the petitioner, we have attempted to arrange the issues for discussion in orderly sequence. As we see it, the first question here involved is whether or not the arresting officers were guilty of making an *unreasonable* search and seizure when they picked up the two day books in the office of Dr. Wolf at the time he was first placed under arrest. We do not contend that a lawful search or a lawful seizure can follow an illegal arrest.[1] Conversely, if the arrest was legal, i.e., if it was made by the officers at a time when they had reasonable grounds to believe that the suspect had committed, or was about to commit, a felony, it follows that they had a right to take into their possession, incident to the arrest, such visible and accessible items of evidence as were available to them. In this connection, it should be noted that we do not assert that the arresting officers had the right to conduct a general search of the office of the accused, or to rummage through the place. No such action was taken, and no threats of force were used. Therefore, this latter premise, so far as the cases at bar are concerned, is moot.

In the absence of a specific statute authorizing arrest without warrant, except in the case of constables,[1] the State of Colorado has adopted and consistently employed the common law rule that a peace officer may, without a warrant, arrest for a felony or for a misdemeanor involving a breach of the peace committed in his presence. In the case of felony, he may also arrest when he has reasonable grounds to believe that a felony has been, or is about to be committed by the person suspect.[2]

This, we believe is the general rule, well stated in the following words:

---

1. Sect. 156, Ch. 96, 1935 C.S.A.

2. Newman v. People, 23 Colo. 300, 310, 47 Pac. 278, Corder v. People, 87 Colo. 251, 259, 287 Pac. 85, People v. Hutchinson (Colo.) 9 Fed. (2nd) 275.

"Generally speaking, either a peace officer or a private individual may, without a warrant, arrest for a felony or for a misdemeanor involving a breach of the peace committed in his presence. Nor is authority to arrest without a warrant confined to offenses committed in the presence of the person making the arrest: arrests without warrants may be made for felonies, whether or not they were committed in the presence of the officer or the private individual making the arrest. . . . An officer may arrest when he has reasonable grounds to suspect that a felony has been committed and may justify by proof of a ground which the law deems reasonable."

4 Am Jur 15, Sect. 22.

The rule has been recognized by this court, and, except perhaps, in some few states that may be governed by local statute is, we believe universally accepted.

"On reason and authority the true rule is that if a search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, . . . the search and seizure are valid. The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens."

Carroll v. United States, 276 U. S. 132, 45 Sect. 280, 283.

The court has also said:

". . . we assume . . . that the facts of which Calhoun and O'Brien had been informed prior to the arrests are sufficient to justify the apprehension without a warrant of Gowen and Bartels for the conspiracy referred to in Braidwood's affidavit and on that basis we treat the arrests as lawful and valid."

Go-Bart Importing Co. vs. United States, 282 U. S. 344, 51 S. St. 153, 158.

This rule, then, is so firmly embedded in the jurisprudence of this nation that we feel it would be an imposi

tion upon the time of the court to present further argument in support of its validity.

We recognize that there is no set standard by which one can say whether or not an arresting officer had "reasonable grounds" to believe that a felony had been or was about to be committed by the accused. We submit that this fact must be determined in each particular case on its merits. We, therefore, pause briefly to point out the salient facts known to the officers at the time when they took Dr. Wolf into custody.

On April 25, 1944, Mr. Ray Humphreys, who, at that time was chief investigator for the District Attorney of Denver, received an anonymous telephone call that a woman at the Cosmopolitan Hotel was suffering from an abortion. The transcript filed by petitioner merely recites that Humphreys "had occasion to make an investigation regarding the activities of a woman by the name of Gertrude Martin at the Cosmopolitan Hotel" (17 R-10), but the original record shows that Miss Martin was found by the officers in rather serious condition, that she was removed to the Denver General Hospital for care and treatment, and later made a statement definitely naming this petitioner and his co-defendant, Dr. Montgomery, as the persons who had performed the illegal abortion upon her.

In Colorado, it is a felony to perform an illegal abortion.[3] Immediately after receiving this information, above referred to, Mr. Humphreys dispatched a deputy sheriff, who also served as an investigator (17 R-14), to the office of Dr. Wolf for the purpose of placing him under arrest. Such officer clearly said that he went to the office of Dr. Wolf to arrest him because of the information received that felonies were committed there (17 R-14).

He was accompanied by two deputies attached to the staff of the District Attorney, and, having arrived at the office, he proceeded forthwith to arrest Dr. Wolf "on the complaint of Miss Martin" (17 R-14).

While this portion of the record is not before the court in toto, the full transcript of the proceeding was reviewed

[3] Sect. 56, Ch. 48, 1935 C.S.A.

by the Supreme Court of Colorado, and since that court found nothing to indicate an illegal arrest, and specifically declared that the seizure of the two day books taken by the officers at the time of the arrest was not an *unreasonable* seizure in violation of Sect. 7, Art. II of the Constitution of Colorado which forbids unreasonable search and seizure, nor was it a violation of Sect. 18, Art. II of said constitution, which provides "that no person shall be compelled to testify against himself in a criminal case".[4] The cases at bar come before this court clothed in the armor of judicial approval supplied by the opinions of the court of last resort of the state whose laws were violated. This interpretation of the factual situation should, we submit, bear great weight here, and we are sure that this court will give proper recognition to the opinion of the Supreme Court of Colorado.

We arrive at the conclusion of the first issue, then, confidently asserting that in the cases here before the court, the petitioner was *lawfully* arrested by a deputy sheriff of the City and County of Denver, on the complaint of Miss Martin, and after such officer had reasonable grounds to believe that Dr. Wolf had committed a felony. Incident to such arrest the officer had the right to take into his possession such visible and accessible items of evidence as were available to him. There was, we submit, no *unlawful* arrest, and certainly no *unreasonable* search and seizure.

II. The Arresting Officers Were Not Engaged in a General or Exploratory Search.

We submit that it is one thing if arresting officers, having gained access to the residence or business establishment of an accused person, proceed to break open locks, rummage through drawers, open closed receptacles, or, by force and violence of any kind, conduct a general or exploratory search of the premises for evidence. Such a search without a warrant is, we are most certain, illegal. It is quite another matter, however, if arresting officers, making a legal arrest, seize evidence on the person of the accused, or readily accessible to them on the immediate

[4] Wolf v. People 117 Colo. 279, 187 Pac. 2nd 926, 927.

premises, all as incident to the arrest. The latter situation is what we find in the cases at bar.

Counsel for the petitioner frankly concede that of the two day books here in question, one was on a table in the doctor's office, and the other on a book case (17 R-12, 18 R-28, 29) both in plain view of the officers and readily accessible to them, or anyone else who might enter upon the premises. At no time was the doctor coerced. He was not compelled to produce his books by threats or violence, nor were the desks, files or other closed receptacles of any kind disturbed. The officers simply walked into his office for the purpose of placing Dr. Wolf under arrest, and, incident thereto, they picked up two ordinary day books lying openly and in plain view on the table and bookcase. Under these circumstances, the following authority is in point:

> "When arrested, Birdsall was actually engaged in a conspiracy to maintain, and was actually in charge of, the premises where intoxicating liquors were being unlawfully sold. . . . The officers were authorized to arrest for crime being committed in their presence, and they lawfully arrested Birdsall. They had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise: *Agnello v. United States*, supra, 30 (46 S. Ct. 4); *Carroll v. United States*, 267 U. S. 132, 158, 45 S. C. 280, 69 L. Ed. 543, 39 A. L. R. 790; *Weeks v. United States*, supra, 392 (34 S. Ct. 341). The closet in which liquor and the ledger were found was used as a part of the saloon. And, if the ledger was not as essential to the maintenance of the establishment as were bottles, liquors and glasses, it was none the less a part of the outfit or equipment actually used to commit the offense. And, while it was not on Birdsall's person at the time of his arrest, it was in his immediate possession and control. The authority of officers to search and seize the things by which the nuisance was being maintained extended to all parts of the premises used for the unlawful purpose. Cf. *Sayers v. United States* (C.C.A.) 2 F. (2d) 146; *Kirvin v. United States*, supra; *United States v. Kirschenblatt*,

supra. The bills for gas, electric light, water, and telephone services disclosed items of expense; they were convenient, if not in fact necessary, for the keeping of the accounts; and, as they were so closely related to the business, it is not unreasonable to consider them as used to carry it on. It follows that the ledger and bills were lawfully seized as an incident of the arrest."

Marron v. United States, 275 U. S. 192, 72 L. E. 231, 48 Sect. 74.

While it is true that Dr. Wolf was not actually engaged in an unlawful act at the time of his arrest, his office, together with that of Dr. Montgomery and Dr. Fulton, was used to carry out the unlawful conspiracy, each doctor using his own office to carry out his part of the unlawful act, and splitting the fees obtained from their desperate patients between them. It is interesting to note that on the very day of the arrest, Agnes Bashor, principal witness in case No. 18, having previously been examined by Dr. Wolf at his office, called at the office of Dr. Fulton where he administered to her the noxious drugs and substances designed to cause her to miscarry, and then sent her to the hotel room he had reserved for her, with instructions to call Dr. Wolf as per arrangement when the drugs took effect, and she needed his services (18 R-16, 17). In this sense of the word, Dr. Wolf was actually engaged in the unlawful conspiracy complained of by the People at the time of his arrest. His office was his headquarters where he awaited call summoning him to participation in the next step of the conspiracy, i.e., the care of the patient after the miscarriage had, in fact, occurred. The books in question were then and there on the premises and in his immediate possession and control. Nor, we submit, can it be denied that such books were "convenient, if not in fact necessary" for the conduct of the doctor's odorous activities.

This court later approved the Marron case, supra, saying:

> "As an incident to the arrest they seized a ledger in a closet where the liquor or some of it was kept and some bills beside the cash register. These things were

visible and accessible and in the offender's immediate custody. There was no threat of force or general search or rummaging of the place."

Go-Bart Importing Co. v. United States, 282 U. S. 344, 75 L. E. 374, 382, 51 S. Ct. 153.

But, say counsel, the seizure of the day books of the petitioner and the subsequent examination thereof by law enforcement officers, was "indecent." Hence, they conclude, unreasonable. They seem to attach some special or peculiar sanctity to the memorandum kept by Dr. Wolf of his criminal activities merely because the petitioner is a doctor. In this conclusion we certainly do not follow them. We have all due respect and the greatest admiration for those unselfish men and women engaged in the practice of the healing arts, who administer to the ills of suffering humanity. When, however, a licensed practitioner so far forgets the oath of his profession that he capitalizes on his knowledge of medicine, and openly and brazenly violates the law, all because of his insatiable greed for gold, we submit that his records are no more inviolate than those of any other law breaker. Again, we point out, the women who sought the services of Dr. Wolf and his co-conspirators were technically just as guilty of a criminal offense as were the defendants. For them, however, we can have compassion. Of the enormity of their moral sin we are not called upon to judge. Suffice it to say that these women, finding themselves with child, and, perhaps fearing the shame that society imposes upon unwed mothers, or perhaps attempting to avoid the economic burden an unwanted child would impose upon them, were desperate. They were acting under emotional strain, a condition we can understand if not condone. The doctors, however, had no such excuse to mitigate their unlawful conduct. Theirs was a coldly calculating, systematic exploitation of the unfortunate plight of these unhappy women. The record reeks with the brutal story, told time and time again, that no help would be forthcoming to aid the girls to free themselves from the rigors of their undesired pregnancy until the fees of the petitioner and his co-conspirator, and high fees they were, were paid in cash and in advance.

Counsel talk of decency and the moral law! Their words, we say, are gravel in their mouths. Greed, not com-

passion, was the motivating influence behind the acts of the accused. Fear, not sympathy, was the lot meted out to those who sought their services.

So far as we can determine, the "privilege" that attaches to communications between physician and patient is not here involved. The patient alone, as counsel concede, can claim the privilege. When such privilege is waived by the patient, we know no rule of law, and no dictate of reason, that permits the doctor to claim "privilege" to hide his illegal act.

By the same token, had the petitioner been guilty of the illegal dispensation of narcotics, he could argue that it was "indecent" for the prosecution to summon the addict patient to testify where he procured the drug. Neither the addict, nor, in this case, the women who had been aborted, were, we presume, anxious to reveal their illegal conduct. Nevertheless, their testimony was competent, their privilege, if any, personal.

We leave this portion of our argument secure in the belief that up to this point we have demonstrated that the petitioner was legally arrested by officers of the law, who had *reasonable* grounds to believe that he had, or was about to commit a felony. That, incident to such arrest, the day books of the petitioner were taken by the arresting officers, and that no *unreasonable* search or seizure of evidence was made by them. These facts appear from the record. Under these circumstances, and relying upon the cases of *Carroll v. United States*, supra, *Go-Bart Importing Co. v. United States*, supra, and *Marron v. United States*, supra, we confidently submit that this petitioner could not claim a violation of his rights under the Constitution of the United States even had he been prosecuted in a Federal court for a federal offense. In other words, we have a *lawful* arrest, even though made without warrant, and, incident thereto, the seizure of evidence in plain sight, and in the possession and control of defendant at the time of the arrest. Hence, there are no facts to sustain petitioner's contention of *unreasonable* search and *unreasonable* seizure. The evidence thus procured by the officers was, we submit, competent and admissible against petitioner in *any* court,

state or federal, and quite irrespective of the application of rules of evidence, hereinafter discussed.

If our position is sound, the instant cases need go no further because all of the contentions of counsel for the petitioner have been answered. Because we believe our position to be sound, we respectfully ask that the opinion of the Supreme Court of Colorado be forthwith affirmed.

III. The Evidence Adduced by the Prosecution Was Admissible.

As hereinabove stated, we do not concede that, at any time herein concerned, there was an improper seizure of the records of this petitioner. Nevertheless, since his whole argument is based upon the assumption that such condition existed, we accept his premise for the purpose of argument only.

Fundamentally, counsel concede that the Fourth Amendment, and other amendments to the Constitution of the United States which constitute the Bill of Rights, have no application to the state governments. They cite *National Safe Dep. Co. v. Illinois*, 232 U. S. 58 as authority for their position. We agree with counsel in their interpretation of the cited opinion.

Nonetheless, and ignoring the opinions of this court, they now contend that the Fourteenth Amendment should be interpreted to mean that evidence, no matter how competent in itself, if illegally seized, may not be used to sustain a conviction in a state court. To permit the reception of such evidence, they say, is to permit conviction without due process of law. This was the identical contention made in the case of *Adams v. New York*, 192 U. S. 585, 594. There it was asserted that the private papers of the accused were seized in a raid of his premises, and as the result of an unreasonable search and seizure. It was contended that such papers were used by the State of New York to convict him in contravention of the 4th, 5th and 14th Articles of Amendment to the Constitution of the United States. The court, however, held that the 4th and 5th Amendments to the Constitution of the United States do not contain limitations upon the power of the states, and continues:

"We do not feel called upon to discuss the contention that the 14th Amendment has made the provisions of the 4th and 5th Amendments to the Constitution of the United States, so far as they relate to the right of the people to be secure against unreasonable searches and seizures and protect them against being compelled to testify in a criminal case against themselves, privileges and immunities of citizens of the United States of which they may not be deprived by the action of the states."

Id. Pg. 594.

This case has been repeatedly followed, among other cases, as counsel say, in *Consolidated Rendering Works v. United States*, 207 U. S. 541, 551.

Where, we ask, is the essential difference between *Adams v. New York*, supra, and the cases at bar? Even if we concede counsel's assertion that here, as in the Adams case, there was an illegal seizure of evidence, the rule remains that since the 4th and 5th Amendments are not limitations on the powers of the states, there is no need to determine whether or not the 14th Amendment made the rights thereby secured privileges and immunities of citizens of the United States of which they may not be deprived by state action. Amplifying this comment, it seems crystal clear that the 14th Amendment conferred no *new* rights or privileges upon citizens of the United States. Therefore, if freedom from unreasonable search and seizure, and the right to be free from compulsion to furnish evidence against oneself, as guaranteed by the 4th and 5th Amendments to the Constitution of the United States, never constituted limitations upon the power of the states, it is unquestionably sure that the 14th Amendment could not extend a right or privilege that never existed.

The point we are trying to make is, unquestionably, more ably stated by this court as follows:

"That the primary reason for that amendment (14th) was to secure the full enjoyment of liberty to the colored race is not denied; yet it is not restricted to that purpose, and it applies to everyone, white or black, that comes within its provisions. But, as said

in the *Slaughter-House Cases*, the protection of the citizen in his rights as a citizen of the state still remains with the state. This principle is again announced in the decision in *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588, wherein it is said that sovereignty for the protection of the rights of life and personal liberty within the respective states, rests alone with the states. But if all these rights are included in the phrase 'privileges and immunities' of citizens of the United States, which the states by reason of the Fourteenth Amendment cannot in any manner abridge, then, the sovereignty of the state in regard to them has been entirely destroyed, and the *Slaughter-House Cases* and *United States v. Cruikshank* are all wrong, and should be overruled.

"It was said in *Minor v. Happersett*, 21 Wall. 162, 22 L. ed. 627, that the amendment did not add to the privileges and immunities of a citizen; it simply furnished an additional guaranty for the protection of such as he already had. And in *Re Kemmler*, 136 U. S. 436, 448, 34 L. ed. 519, 524, 10 Sup. Ct. Rep. 930, it was stated by the present Chief Justice that—

" 'The Fourteenth Amendment did not radically change the whole theory of the relations of the state and Federal governments to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of a state. Protection to life, liberty, and property rests primarily with the states, and the amendment furnishes an additional guaranty against any encroachment by the states upon those fundamental rights which belong to citizenship, and which the state governments were created to secure. The privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of states, are indeed protected by it; but those are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States. *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394.' "

Maxwell v. Dow, 176 U. S. 582, 593.

Contrary to this decision, counsel for the petitioner now argue that the term "due process of law" as used in Sect. 1 of the 14th Amendment, refers back to the prohibition against unreasonable search and seizure, as stated in the 4th Amendment, and makes of that prohibition a limitation on the state, even though the 4th Amendment itself constitutes no such limitation.

In other words, counsel attempts to multiply nothing by nothing and get something. In spite of the well stated and highly emotional plea of counsel, however, the answer must still be that nothing multiplied by nothing equals nothing.

Much the same argument advanced on behalf of the petitioner was urged in *Palko v. Connecticut*, 302 U. S. 319. The court, however, disposed of such argument, saying:

> "We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments 1 to 8) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule."
>
> *Id.* Pg. 323.

Commenting again on the proposition that the immunities guaranteed by the Bill of Rights contained in the Constitution of the United States do not extend beyond those which arise out of the relationship of citizens of the United States to the national government, Mr. Justice Stone had this to say:

> ". . . there is no occasion, for jurisdictional purposes or any other, to consider whether freedom of speech and of assembly are immunities secured by the privileges and immunities clause of the Fourteenth Amendment to citizens of the United States, or to revive the contention rejected by this Court in the *Slaughter-House Cases*, supra, that the privileges and immunities of United States citizenship, protected by that clause, extend beyond those which arise or grow

out of the relationship of United States citizens to the national government."

Hague v. Com. for Ind. Organization, 307 U. S. 496, 519.

We cannot refrain from quoting the rather extensive footnote that appears in explanation of the excerpt above set forth. We quote:

"The privilege or immunity asserted in the Slaughter-House Cases was the freedom to pursue a common business or calling, alleged to have been infringed by a state monopoly statute. It should not be forgotten that the Court, in deciding the case, did not deny the contention of the dissenting justices that the asserted freedom was in fact infringed by the state law. It rested its decision rather on the ground that the immunity claimed was not one belonging to persons by virtue of their citizenship. 'It is quite clear', the Court declared (16 Wall. page 74, 21 L. Ed. 394), 'that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics * * * in the individual.' And it held that the protection of the privileges and immunities clause did not extend to those 'fundamental' rights attached to state citizenship which are peculiarly the creation and concern of state governments and which Mr. Justice Washington, in *Corfield v. Coryell*, 4 Wash. C. C. 371, 6 Fed. Cas. page 546, No. 3230, mistakenly thought to be guaranteed by Article IV, 2 of the Constitution. The privileges and immunities of citizens of the United States, it was pointed out, are confined to that limited class of interests growing out of the relationship between the citizen and the national government created by the Constitution and federal laws. *Slaughter-House Cases*, 16 Wall. 36, 79; 21 L. Ed. 394; see *Twining v. New Jersey*, 211 U. S. 78, 97, 98, 29 Ct. 14, 18, 53 L. Ed. 97.

"That limitation upon the operation of the privileges and immunities clause has not been relaxed by any later decisions of this Court. In re *Kemmler*, 136 U. S. 436, 448, 10 S. Ct. 930, 934, 34 L. Ed. 519; *Mc*

Pherson v. Blacker, 146 U. S. 1, 38, 13 S. Ct. 3, 11, 36 L. Ed. 869; *Giozza v. Tiernan*, 148 U. S. 657, 661, 13 S. Ct. 721, 723, 37 L. Ed. 599; *Duncan v. Missouri*, 152 U. S. 377, 382, 14 S. Ct. 570, 571, 38 L. Ed. 485. Upon that ground appeals to this Court to extend the clause beyond the limitation have uniformly been rejected, and even those basic privileges and immunities secured against federal infringement by the first eight amendments have uniformly been held not to be protected from state action by the privileges and immunities clause. *Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678; *Hurtado v. California*, 110 U. S. 516, 4 S. Ct. 111, 292, 28 L. Ed. 232; *Presser v. Illinois*, 116 U. S. 252, 6 S. Ct. 580, 29 L. Ed. 615; *O'Neil v. Vermont*, 144 U. S. 323, 12 S. Ct. 693, 36 L. Ed. 450; *Maxwell v. Dow*, 176 U. S. 581, 20 S. Ct. 448, 494, 44 L. Ed. 597; *West v. Louisiana*, 194 U. S. 258, 24 S. Ct. 640, 48 L. Ed. 965; *Twining v. New Jersey*, supra; *Palko v. Connecticut*, 302 U. S. 319, 58 S. Ct. 149, 82 L. Ed. 288.

"The reason for this narrow construction of the clause and the consistently exhibited reluctance of this Court to enlarge its scope has been well understood since the decision of the Slaughter-House Cases. If its restraint upon state action were to be extended more than is needful to protect relationships between the citizen and the national government, and if it were to be deemed to extend to those fundamental rights of person and property attached to citizenship by the common law and enactments of the states when the Amendment was adopted, such as were described in *Corfield v. Coryell*, supra, it would enlarge Congressional and judicial control of state action and multiply restrictions upon it whose nature, though difficult to anticipate with precision, would be of sufficient gravity to cause serious apprehension for the rightful independence of local government. That was the issue fought out in the *Slaughter-House Cases*, with the decision against enlargement.

"Of the fifty or more cases which have been brought to this Court since the adoption of the Fourteenth Amendment in which state statutes have been assailed as violating the privileges and immunities

clause, in only a single case was a statute held to infringe a privilege or immunity peculiar to citizenship of the United States. In that one, *Colgate v. Harvey*, 296 U. S. 404, 56 S. Ct. 252, 80 L. Ed. 299, 102 A.L.R. 54, it was thought necessary to support the decision by pointing to the specific reference in the *Slaughter-House Cases*, supra, 16 Wall. page 79, 21 L. Ed. 394, to the right to pass freely from state to state, sustained as a right of national citizenship in *Crandall v. Nevada*, 6 Wall. 35, 18 L. Ed. 745, before the adoption of the Amendment.

"The cases will be found collected in Footnote 2 of the dissenting opinion in *Colgate v. Harvey*, 296 U. S. 404, 445, 56 S. Ct. 252, 266, 80 L. Ed. 299, 102 A.L.R. 54. To these should be added *Holden v. Hardy*, 169 U. S. 366, 18 S. Ct. 383, 42 L. Ed. 780; *Ferry v. Spokane, P. & S. R. Co.* 258 U. S. 314 42 S. Ct. 358, 66 L. Ed. 635, 20 A.L.R. 1326; *People of New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 49 S. Ct. 61, 73 L. Ed. 184, 62 A.L.R. 785; *Whitfield v. Ohio*, 297 U. S. 431, 56 S. Ct. 532, 80 L. Ed. 778; *Breedlove v. Suttles*, 302 U. S. 277, 58 S. Ct. 205, 82 L. Ed. 252; *Palko v. Connecticut*, 302 U. S. 319, 58 S. Ct. 149, 82 L. Ed. 288."

Id. Pg. 520.

While we believe that the authorities cited clearly establish our contention that the Fourteenth Amendment does not operate to extend the provisions of the 4th and 5th Amendments as a limitation on the several states, we now turn to the specific arguments of counsel for the petitioner and demonstrate this inapplicability.

A. The due-process clause of the Fourteenth Amendment.

In support of their assertion, as they interpret it, counsel first cite *Twining v. New Jersey*, 211 U. S. 78, 99, 100.

In that case, of course, the court held that the first ten amendments are not operative on the states, and affirmed the judgment of conviction entered by the state court. There the court reiterated the rule that:

"Due process requires that the court which assumes to determine the rights of parties shall have

jurisdiction (*Pennoyer v. Neff*, 95 U. S. 714, 733, 24 L. Ed. 565, 572; *Scott v. McNeal*, 154 U. S. 34, 38 L. Ed. 896, 14 Sup. Ct. Rep. 1108; *Old Wayne Mut. Life Asso. v. McDonough*, 204 U. S. 8, 51 L. Ed. 345, 27 Sup. Ct. Rep. 236), and that there shall be notice and opportunity for hearing given the parties. (*Hovey v. Elliott*, 167 U. S. 409, 42 L. Ed. 215, 17 Sup. Ct. Rep. 841; *Roller v. Holly*, 176 U. S. 398, 44 L. Ed. 520, 20 Sup. Ct. Rep. 410; and see *Londoner v. Denver*, 210 U. S. 373, 52 L. Ed. 1103, 28 Sup. Ct. Rep. 708). Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has, up to this time, sustained all state laws, statutory or judicially declared, regulating procedure, evidence, and methods of trial, and held them to be consistent with due process of law."

Id., Pg. 110.

Applying this test to the cases at bar, it is clear that the courts of Colorado did have jurisdiction, and that the defendants had full opportunity to be heard and to present their defense. The rule approved by the Supreme Court of Colorado as to the admissibility of evidence was surely a rule of procedure, and hence not violative of the prohibitions prescribed by the 14th Amendment pertaining to due process of law.

Herbert v. Louisiana, 272 U. S. 312, next cited, also affirmed a state court conviction. There the court held that there was no denial of due process of law when it appeared that the state court had jurisdiction of the person of the accused, that the defendant was, in fact, before the court and was accorded full opportunity to defend.

Id., Pg. 315.

Adamson v. California, 332 U. S. 46, likewise an affirmance of a state court conviction, adds nothing to the instant argument, and *Palko v. Connecticut*, 302 U. S. 319, we have heretofore discussed.

B. Freedom from unreasonable search and seizure.

Counsel next cite a number of cases where this court has held that a conviction based upon a confession obtained by duress or coercion is a conviction obtained without due process of law, and hence illegal. They then argue, by analogy, that evidence obtained as a result of an illegal search falls in the same category, although they are unable to cite any authority to sustain their position.

A very important distinction arises between the two classes of evidence. In the first case, a confession obtained by duress or coercion is not *competent* evidence. This because it does not, by its very nature, bear the stamp of verity. An accused man, tortured by whatever means, may readily say whatever his tormentors may desire him to say, irrespective of its ultimate truth, to obtain temporary relief from inquisition. Consistently, the Supreme Court of Colorado has refused to sustain a conviction based upon an involuntary confession of the accused. The last pronouncement of the Colorado Court so holding is found in *Bruner v. People,* 113 Colo. 194, 156 Pac. (2nd) 111.

In the second case, the evidence may or may not be competent, but, if so, the sole ruling of the Colorado court is that such evidence is admissible, and that the court will not make a collateral inquiry as to the manner in which the evidence was obtained.

Imboden v. People, 40 Colo. 142, 90 Pac. 608.
Massantonio v. People, 77 Colo. 392, 236 Pac. 1019.
Roberts v. People, 78 Colo. 555, 243 Pac. 544.
Bills v. People, 113 Colo. 326, 157 Pac. (2nd) 139.

This, as we see it, is a rule pertaining to the admission of evidence, and goes no further than that.

Even the case of *Harris v. United States,* 331 U. S. 145, 155, cited by counsel, is not helpful to the cause of the petitioner here. There the court held that the evidence in question was legally seized, and sustained the conviction of the accused for a federal offense.

Mr. Justice Frankfurter, in his dissenting opinion, recognized that the rule relative to the admission of evi

dence illegally seized applies only in courts of the United States, as against the rule prevailing in many states of which Colorado is one, that such evidence is admissible, if otherwise competent.

Id., Pg. 159.

We have repeatedly stated, in the case at bar, that, as we view it, there was no illegal arrest, no unreasonable search and seizure, no general exploratory search, and no rummaging through the personal effects of Dr. Wolf.

We submit the point without further argument.

C. Protection from unreasonable search and seizure.

Very frankly, we submit that the discussion advanced by counsel for the petitioner in this portion of their brief (Pgs. 13-29—Brief of Petitioner) is wholly inapplicable to either of the cases at bar. All of the authorities they cite refer to prosecutions had in federal courts for the commission of alleged offenses against the laws of the United States. As to such cases there is no argument that evidence, if it has been illegally seized, is not admissible. We concede the point. Basically, however, we are back to the proposition that the prohibition against unreasonable search and seizure set forth in the Constitution of the United States is a limitation on the powers of the national government and does not extend to the government of the several states. We do not intend to be lured from this basic point of law by the argument of counsel whereby they sustain the federal rule.

So far as Colorado is concerned, the state constitution provides, in part:

> "The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or thing shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation reduced to writing."

Art. II, Sect. 7, Constitution of Colorado.

and

"No person shall be deprived of life, liberty or property, without due process of law."

Art. 2, Sect. 25, Constitution of Colorado.

The Supreme Court of Colorado, being the highest judicial tribunal of the state, determined that the guarantees of the state constitution were not violated by the proceedings had against Dr. Wolf and his co-defendants. This, of course, is evidenced by the order of said court affirming such convictions.

Wolf v. People, 117 Colo. 279, 187 Pac. (2nd) 926.
Wolf v. People, 117 Colo. 321, 187 Pac. (2nd) 928.

We respectfully submit that it is, and was, the responsibility of the state to determine this question, and that further discussion of the issue is precluded at this time. We ask the court so to declare.

D. The Petitioner was not denied due process of law.

Relying primarily upon the case of *Twining v. New Jersey*, 211 U. S. 78, counsel for the petitioner attempt to paraphrase the words adopted by this court in the discussion of the issue there involved, and, in effect, argue that an unreasonable search and seizure is, in itself, a denial of due process of law, irrespective and quite independent of the provisions of the Fourth Amendment to the Constitution of the United States.

Their first point is that any search or seizure, without warrant, is unreasonable. This premise, of course, is unsound because where, as here, the arresting officers have reasonable grounds to believe that the accused has committed or is about to commit a felony, arrest without warrant is fully justified (*Carroll v. United States*, supra), and the seizure of evidence readily accessible, obtained by the officers incident to the arrest, and not secured by a general exploratory search or a rummaging of the premises, is not an unreasonable search and seizure. *Marron v. United States*, supra, *Go-Bart Importing Co. v. United States*, supra.

They next contend that the rule against search and

seizure is substantive rather than procedural, and rely on *Boyd v. United States*, 116 U. S. 616 and the authorities therein cited. There is no question, if the petitioner were here prosecuted in a federal court for violation of a law of the United States, that the authority would be of value. Not so, however, in a prosecution in a state court for violation of a state statute.

If we turn to the case of *Twining v. New Jersey*, supra, which is the basis of the entire argument of counsel, we find that this court has always been extremely reluctant to define exactly "due process of law." Indeed, the court states that "few phrases of the law are so elusive of exact apprehension as this."

Id., Pg. 20. (29 S. Ct. 14, 20.)

What did the founding fathers of this great nation deem to be the immutable rights of all free men? The Declaration of Independence says the inalienable rights of mankind are, among others, life, liberty and the pursuit of happiness. It then states that these rights are secured by governments instituted among men and deriving their just powers from the consent of the governed. The signers of the Declaration of Independence did not complain of the acts of Great Britain in committing search and seizure without warrant, although history teaches us that such practice was prevalent in the colonies. It was not, however, one of the unbearable invasions of the rights of free men of which complaint was made. When the Constitution of the United States was adopted, the privilege of freedom from unreasonable search and seizure was, significantly enough, omitted. The framers of the Constitution did, however, include in that great document explicit prohibitions against the suspension of the writ of habeas corpus and the passage of ex post facto laws or bills of attainder. Specifically the states were denied certain powers, but the power to declare what evidence should be deemed admissible in the trial of a criminal case was, most surely, never removed from the control of the state.

We respectfully submit that if the court subjects the privileges set forth in the Fourth Amendment to the same test to which it put the privileges referred to in the Fifth Amendment (*Twining v. New Jersey*, supra), it is inevitable

that here, as there, the court will determine that freedom from unreasonable search and seizure is not an inalienable possession of every citizen, but a privilege protected, so far as national citizenship is concerned, by the Constitution of the United States, and, as to state citizenship, by the Constitution of the State. The Supreme Court of Colorado declared the rights of this petitioner under the Constitution of Colorado were not impaired. Further, the record discloses that the petitioner was lawfully arrested, that no exploratory search of his office was made, and that no question of unreasonable search and seizure is here involved.

It will be further noted, that all of the cases cited by counsel for the petitioner in this portion of their brief (Pgs. 20-27) pertain to proceedings had in federal courts for alleged federal offenses. The decisions do not attempt to review proceedings instituted in a state court for a violation of a state statute.

IV. The State of Colorado Was Within Its Powers in Permitting the Reception of the Evidence of Which Complaint Is Here Made.

Again we reiterate our position that Dr. Wolf was lawfully arrested, and that the day books taken from his office were properly taken as incident to the arrest.

If, however, for the sake of argument, we now concede that such books were illegally seized, still the petitioner cannot be heard to complain.

It is true that there is apparently an irreconcilable conflict among the decisions of the courts of last resort of the several states pertaining to the admission of evidence illegally obtained. Colorado, by the decisions of its Supreme Court, is committed to the doctrine that the manner in which evidence is obtained, whether legal or illegal, does not affect its admissibility. This rule was established in the case of *Lyboldt v. People*, 40 Colo. 142, 90 Pac 608. It was affirmed in the later cases of *Massantonio v. People*, 77 Colo. 392, 236 Pac. 1019, *Ballotti v. People*, 78 Colo. 555, 243 Pac. 544, and *Bills v. People*, 113 Colo. 326, 157 Pac (2nd) 130. In the case of *Ballotti v. People*, supra, the Colorado court said:

"4. Since the supersedeas was granted in the instant case we have established, as the rule in this jurisdiction, that the admissibility of evidence is not affected by the fact that it has been unlawfully seized. *Massantonio v. People*, 77 Colo. 392, 236 Pac. 1019."

"That conclusion was reached after a thorough examination of all the available authorities and a careful consideration of the alleged reasons supporting each. We reaffirm it. It is now urged, however, that one of the reasons there given must fail in this jurisdiction because section 3726, C. L. 1921, exempts an officer from liability for any unlawful act committed while engaged, in good faith, in the enforcement of the prohibition law. The validity of that act, when urged in defense of one who invades the sanctity of another's domicile in violation of the Constitution, must be determined when properly before us. It is not so here. If, under such circumstances, the act would be a complete defense, it must be because the legislature was empowered to adopt it, and if so its existence would affect in no way the rule laid down in the Massantonio case nor the reasons supporting it. There is ample authority, as therein set forth, for that decision, but it does not rest primarily upon authority, but upon reason. If the application of the rule were divorced from popular prejudice concerning the manufacture and sale of intoxicating liquor, and violations of law by corporations, proof of which depends upon records unlawfully seized, we think the unanimous verdict of lawyer and layman would support the rule of admissibility. Let it be announced, for instance, that one unquestionably guilty of an atrocious murder had been turned loose because it developed that the weapon with which the crime was committed and the blood soaked clothes of the victim, offered in evidence, and without which conviction could not be obtained, had been excluded because some rule of law had not been complied with in their seizure, and a shudder would run through the commonwealth, and its citizens, with one voice, would condemn the helplessness of its courts against the depredations of outlaws.

"The argument that the rule announced in the

Massantonio case leaves the citizens unprotected against one who unlawfully and violently enters his dwelling if the wrongdoer is unable to respond in damages, should be addressed to the legislature not the courts, and apparently overlooks the fact that such an entry was a criminal trespass and indictable at common law (19 Cyc. 1113, 1117), and that the common law has been adopted in Colorado."

Colorado is not alone in thus interpreting the law. Following earlier decisions of the state appellate court, the Court of General Sessions of New York County in 1939 approved the rule that

> "The court will not take notice of how they (papers or other articles of personal property) were obtained—whether lawfully or unlawfully—nor will it frame issues to determine that question."
>
> *People v. Kuhn*, 15 N.Y.S. (2d) 1005, 1007.

In Maryland, although now governed by specific statutory provisions, the like of which we do not have in Colorado, the Court of Appeals announced the law, in a well worded decision, as follows:

> "Prior to the enactment of the Bouse Act in 1929, Maryland followed the ancient rule of the common law that evidence is not rendered inadmissible by the fact that it was procured by unlawful search and seizure. *Meisinger v. State*, 155 Md. 195, 141 A. 536, 142 A. 190. The Supreme Court of California explained the reason for the rule in the following language: 'From the necessities of the case the law countenances many devious methods of procuring evidence in criminal cases. The whole system of espionage rests largely upon deceiving and trapping the wrongdoer into some involuntary disclosure of his crime. It dissimulates a way into his confidence; it listens at the keyhole and peers through the transomlight. It is not nice, but it is necessary in ferreting out the crimes against society which are always done in darkness and concealment.' *People v. Mayen*, 188 Cal. 237, 205 P. 435, 440, 24 A.L.R. 1382. Unquestionably it is within the established power of the State to prescribe the evidence

which may be received in the courts of its own government."

Hubin v. State, (Md.) 23 Atl. (2d) 706, 708.

In 1938, the Supreme Court of North Carolina said:

"Under the common law, with few exceptions, such as involuntary confessions, evidence otherwise competent is admissible irrespective of the manner in which it was obtained by the witness. The Courts look to the competency of the evidence, not to the manner in which it was acquired. This rule has long been followed in the Courts of North Carolina. *State v. Graham*; 74 N. C. 646, 21 Am. Rep. 493; *State v. Mallett*, 125 N. C. 718, 725, 34 S.E. 651 (affirmed by the United States Supreme Court on writ of error in *Mallett v. North Carolina*, 181 U. S. 589, 21 S. Ct. 730, 45 L. Ed. 1015; *State v. Thompson*, 161 N.C. 238, 76 S.E. 249; *State v. Wallace*, 162 N.C. 622, 623, 78 S.E. 1, Ann. Cas. 1915B, 423; *State v. Neville*, 175 N.C. 731, 95 S.E. 55; *State v. Godette*, 188 N.C. 497, 125 S.E. 24; *State v. Hickey*, 198 N.C. 45, 150 S.E. 615. The rule is stated in 1 Greenleaf Ev., sec. 254a, as follows: 'It may be mentioned in this place that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question.'"

State v. McGee, 214 N.C. 184, 198 S.E. 616, 617.

This decision was further approved by the same court in 1940 in the case of *State v. Shermer*, 216 N. C. 719, 6 S.E. (2d) 529, 530.

A well worded decision further recognizing the right of each state to fix the rules of evidence within its jurisdiction is as follows:

"... appellant insists that there must be removed from the evidence above discussed all testimony given by the two officers, for the reason that they entered the apartment without a search warrant. Continuing

his theory at this juncture, appelant complains that such actions on the part of those officers amounted to and were an infringement of his constitutional rights. More particularly, it is his claim that the trial court's reception of the evidence thus obtained violates the Fourth and Fourteenth Amendments to the United States Constitution, and sections 8 and 9, art. 1, of the Iowa Constitution. Further appellant urges that the federal prohibitory law does not permit the use of evidence obtained by a search and seizure without a valid search warrant, and cites *Peru v. United States*, (C.C.A.) 4 F. (2d) 880.

"But the indictment in the case at bar is not based upon the laws of the United States. Said instrument was founded upon the state law against trafficking in intoxicating liquors. So the state rule, as distinguished from the federal doctrine, must govern. Previously this court was required, at different times, to pass upon the question relating to the admissibility of evidence obtained in the manner and way here employed. Upon those occasions it was held that such evidence could be properly received. *State v. Bambertti*, 204 Iowa 670, 215 N.W. 752; *State v. Gorman*, 196 Iowa 237, 194 N.W. 225; *Joyner v. Utterback*, 196 Iowa 1040, 195 N.W. 594; *State v. Rowley*, 197 Iowa 977, 195 N.W. 881; *Lucia v. Utterback*, 197 Iowa 1181, 198 N.W. 628; *State v. Parenti*, 200 Iowa 333, 202 N.W. 77; *State v. Wenks*, 200 Iowa 669, 202 N. W. 753. Apt language in the Lambertti case is:

"'Prior to the time of the trial, the defendant filed a motion to suppress all of the evidence obtained by the search of the defendant's premises under the search warrant, on the ground that said search warrant was illegally issued, in that the same was in violation of section 8, article 1, of the Constitution of the state of Iowa, * * * and in violation of the Fourth Amendment to the Constitution of the United States, and in violation of the Fifth Amendment to the Constitution of the United States. This motion was by the court overruled.

"'Objections were made to all of the foregoing evidence at the time of the trial, for the reasons urged

in the "motion to suppress", and the objections were by the court overruled. These rulings by the court are assigned as error. In *State v. Tonn*, 195 Iowa 94 (191 N.W. 530), we held that evidence which is pertinent and relevant is admissible against the defendant in a prosecution for crime, even though the same was secured by an unlawful search of defendant's premises, and have universally so held in the subsequent cases. * * *"

"Reluctantly, there was no error permitting the introduction of such testimony."

State v. Bamsey, (Iowa) 223 N.W. 873, 874.

In a very recent decision by the Federal Circuit Court of Appeals (Tenth Circuit), the court said:

"When the officers got to his room, they took possession of two suitcases belonging to him. They opened them and examined their contents. These contents were offered and received in evidence over the objections of appellant. This evidence was of such a nature that it no doubt was considered by the jury and tended to influence its verdict. Admittedly the officers had no search warrant at the time they seized these suitcases and took possession of these exhibits.

* * * * *

"Even if we assume that the search was illegal, the evidence was nevertheless admissible. It is well settled that evidence obtained by State officers through an unreasonable or illegal search may nevertheless be used by the Federal government in a criminal case instituted in the Federal courts. Under this well settled principle, this evidence was clearly admissible."

Ruhl v. United States, (1945) 148 Fed. (2d) 173, 174.

We also call attention to the following pronouncement, made in 1944, quoting from an earlier California case:

"'There is no rule better established or more universally recognized by the courts than that where competent evidence is produced on a trial the courts will not stop to inquire or investigate the source from

whence it comes or the means by which it was obtained.'"

People v. Onofrio, (Cal.) 151 Pac. (2d) 158, 160.

Continuing, the California court said:

"This reason in the Mayen case found approval in the recent case of *People v. Gonzales*, 1942, 20 Cal. (2d) 165, 124 P. (2d) 44, 47, where it is cited with other cases and where the court also passed adversely upon the same contention that is made in the instant case, namely, that 'the prohibition in the Fourth Amendment of unreasonable searches and seizures is included in the provision of the Fourteenth Amendment that no state shall deprive any person of life, liberty, or property without due process of law, and therefore that under the interpretation given to the Fourth Amendment by the federal courts the introduction of evidence obtained by an illegal search and seizure constitutes a denial of due process of law.' The court points out that 'A criminal trial does not constitute a denial of due process of law so long as it is fair and impartial,' and 'The use of evidence obtained through an illegal search and seizure does not violate due process of law for it does not affect the fairness or impartiality of the trial. (Cases cited.) The fact that an officer acted improperly in obtaining evidence presented at the trial in no way precludes the court from rendering a fair and impartial judgment.' A writ of certiorari was denied by the Supreme Court of the United States in the *Gonzales case*, 317 U.S. 657, 63 S. Ct. 55, 87 L. Ed. 528." (Id. 160.)

The ruling was affirmed in *People v. Peak*, (Cal.) 153 Pac. (2d) 464, where at page 469 the court, recognizing "that various jurisdictions are not entirely in harmony with the above stated principles that redress for wrongful possession is not the exclusion of pertinent evidence", concludes that, in that state, it is necessary to "turn to California decisions which must be accepted as the guide post directing the rule to follow."

So, in Colorado, the trial courts would indeed be subject to just criticism if they failed to look to the previous announcements of the Colorado Supreme Court "as guide posts directing the rule to follow" in this jurisdiction. That rule is unmistakingly set forth in *Tinhoden v. People, supra, Massantonio v. People, supra, Roberts v. People, supra,* and *Bilis v. People, supra.* So surely is this true that we deem it unnecessary to comment further on the point.

The situation, then, is plain that there does exist a "federal rule" of evidence, applicable in federal courts, which rule has been followed by some state courts. Other states, including Colorado, have followed the common law rule, as certainly we are bound to do until such time as the legislature of the state enacts an appropriate statute or statutes abrogating or modifying the common law.

Summing up our argument on this point, it is our sincere contention that there was no illegal search and seizure in the instant case, because the arrest, even though made without warrant, was nevertheless based upon a reasonable belief by the officers that the accused was guilty of a felony and was, therefore, lawful. No *search* of any kind was made, but evidence, in plain sight of the arresting officers, was taken and subsequently utilized. This was not an *unreasonable search and seizure* such as is prohibited by the organic law of Colorado. Furthermore, if there was an illegal search and seizure of evidence, competent in itself, such evidence was admissible under the decisions of the Supreme Court of Colorado, and the trial judge was bound to follow the rules of law so announced for this jurisdiction.

CONCLUSION

Summarizing our argument in the cases at bar, we respectfully submit that the following facts appear from the record, or are supported by the opinion of the Supreme Court of Colorado affirming the conviction of the petitioner and his co-defendants:

1. The petitioner was lawfully arrested by law enforcement officers who had reasonable grounds

to believe that he had committed, or was about to commit, a felony.

2. Incident to such arrest, the officers lawfully took into their possession, two day books lying in open view on a table and book case in the doctor's office.
3. There was no search of the premises, no breaking of locks, no opening of drawers, no search of files and no rummaging of the place by the arresting officers.
4. There was no unreasonable search and seizure contrary to the provisions of the Constitution, of Colorado, or the Constitution of the United States.

If the court sustains us in these points, the case is at an end, and the judgment of the Colorado court should be forthwith affirmed.

If, however, this court finds that there was an illegal seizure of the evidence by state officers, yet the admissibility of such evidence on a prosecution for violation of a statute of Colorado was a matter for determination by the state court. The only rights of the petitioner here involved were his rights as a citizen of the state, and his rights of national citizenship were not curtailed.

Finally; we urge that the freedom from unreasonable search and seizure guaranteed by the 4th Amendment to the Constitution of the United States, together with the other rights and privileges contained in the Bill of Rights, applies only to the national government and not to the state government, and that freedom from unreasonable search and seizure is no more a part of the immutable principles of justice than is freedom from compulsory self-incrimination, or the right to trial by jury. Hence, we submit, determination of the issue by the state court, which surely had jurisdiction of the person of the accused, and where he was given full opportunity to present his defense, accorded the petitioner due process of law.

We earnestly submit that the judgment of the Colorado court has violated none of the constitutional privileges or immunities of the petitioner, and we ask that this great

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SUPREME COURT, U.S.

OPPOSITION BRIEF.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1947.

No. 594 18

JULIUS A. WOLF, PETITIONER,

vs.

THE PEOPLE OF THE STATE OF COLORADO

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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OPPOSITION BRIEF.

STATEMENT RE JURISDICTION.

While it is contended by petitioner that jurisdiction exists by virtue of Section 237 (b) of the Judicial Code as amended by Act of February 13, 1925 (Chapter 229, 43 Stat. 936), the respondent respectfully suggests that such jurisdiction does not here exist because the final judgment of the Supreme Court of Colorado did not include in its opinion an interpretation of any federal statute nor did it attempt to interpret any title, right, privilege, or im-

munity claimed by the petitioner under the Constitution of the United States, nor, indeed, was any title, right, privilege, or immunity claimed by the petitioner under the Constitution of the United States presented for the proper consideration of the Colorado courts.

It will be observed from the brief filed by petitioner that he was convicted in two separate cases, as follows:

Julius A. Wolf and A. H. Montgomery v. The People of the State of Colorado. No. 15666.

Julius A. Wolf, Charles H. Fulton and Betty Fulton v. The People of the State of Colorado. No. 15670.

In this court, the petitioner has filed two separate abstracts, purporting to cover the record in each case above referred to, but only one brief. Here, the abstracts of record, designated as "Transcript of Record", are numbered as follows:

No. 593—Julius A. Wolf, Petitioner, v. The People of the State of Colorado, Respondent.
(This being the Wolf-Montgomery case, *supra* No. 15666.)

No. 594—Julius A. Wolf, Petitioner v. The People of the State of Colorado, Respondent.
(This being the Wolf-Fulton case, *supra*, No. 15670.)

In the Petition for Certiorari (p. 2), counsel assert that page references in their brief "are to the Wolf-Montgomery record" while "folio references are to the record in the Wolf-Fulton case." We have found it difficult to refer to the page numbers and folio numbers thus mentioned in petitioner's brief, and will, in our reference to the filed Transcripts of Record, identify the transcript to which we refer, and the page thereof to which we desire to call attention.

It is conceded by the petitioner that "the Fourth Amendment, like all other amendments which constitute the federal Bill of Rights, has no application to the state governments." (p. 7, Petitioner's Brief). Counsel contend, how-

ever, that the Fourteenth Amendment drew within its scope such earlier amendments as were "implicit in the concept of ordered liberty", and, from this premise, argue that the rights of the Petitioner under the Fourteenth Amendment were violated by the Colorado court.

It is fundamental, of course, that only such matters as are properly presented for review will be considered in an appellate court. Here, the petitioner did not claim, either in his motion for new trial, filed with the trial court nor in his Assignments of Error filed with the Supreme Court of the State of Colorado, any violation of his rights under the Fourteenth Amendment, nor, in the trial did he specially set up or claim any right, privilege, or immunity under the Fourteenth Amendment. No such question was presented for the consideration of the Supreme Court of Colorado, and the Court did not err in refusing to pass thereon.

only to the "4th Amendment to the Constitution of the United States" (pp. 67, 68), and his Assignments of Error likewise refer only to the same (Fourth) Amendment; (pp. 73, 74).

Likewise, in the Wolf-Fulton case (No. 594), the transcript discloses that petitioner's Motion for New Trial referred only to "the 4th Amendment of the Constitution of the United States", (p. 47, 48), and his Assignments of Error mentioned only the same (Fourth) Amendment (p. 56).

The Colorado courts, both the District Court of the City and County of Denver (the trial court), and the Supreme Court of Colorado, correctly interpreted the issues, i. e., the alleged violation of the rights, privileges or immunities of the petitioner under the Fourth Amendment, as unavailing to him in a prosecution in a state court for violation of a state statute.

It was not until all briefs had been filed in the appellate court, and both cases had been set for oral argument, that petitioner, for the first time, attempted to file a Supplemental Assignment of Error, in violation of the es-

tablished practice and procedure in Colorado, whereby, for the first time he attempted to assert a "violation of the rights of the defendant (petitioner) under the due process clause of the Fourteenth Amendment of the Constitution of the United States" (Wolf-Montgomery Transcript, No. 593, p. 83), (Wolf-Fulton Transcript, No. 594, p. 66). The Colorado Supreme Court properly denied petitioner's motion to file such supplemental assignment of error (No. 593, p. 83) (No. 594, p. 67), the same coming much too late to be considered by the appellate court.

The record thus conclusively shows that the petitioner, in the proceedings had against him in Colorado, at no proper time specially set up or claimed any title, right, privilege or immunity under the Constitution of the United States, applicable to the state government, as required by Section 237(a), Chapter 229 (43 Stat. 936), and hence has failed to establish the necessary grounds giving this court jurisdiction of the instant cause.

STATEMENT OF THE CASE.

The transcripts filed in this court on behalf of the petitioner omit many vital references to testimony given at the trial, and we therefore shall take the liberty of repeating a partial review of the evidence as the same appears in our original answer brief filed with the Supreme Court of the State of Colorado in the case of Wolf-Montgomery v. The People of the State of Colorado. We select this case because the Transcript filed in Case No. 593 in this court corresponds thereto and carried the identical folio numbers of the original record. The court will observe the omission in petitioner's instant transcript of numerous folios referred to in our statement of facts.

We shall confine our statement solely to the facts pertaining to the alleged unlawful search of petitioner's office and the alleged unlawful seizure of evidence.

It appears that on or about April 25, 1944, the office of the district attorney received an anonymous telephone call to the effect that "there was a woman suffering from an abortion in room 602 in the Cosmopolitan Hotel" (fol.

211). Responding to this call, one Ray Humphries, chief investigator, and his assistant, Louis Malach, proceeded to the hotel, where, in room 602, they found a young woman by the name of Gertrude Martin. Miss Martin was ill, and, upon being questioned, she told the officers that "she had been aborted by Dr. Montgomery and had been to see Dr. Wolf before and after the abortion, etc." (fol. 122). She was immediately removed to the office of the district attorney and thence to the Denver General Hospital for hospitalization (fol. 123). The information given Mr. Humphries by Miss Martin was, we gather, almost the same story related by Mrs. Cairo concerning her experiences in freeing herself, with the aid of these defendants, of the burden of an unwanted child.

Armed with this information, Mr. Malach, who, in addition to being an investigator for the district attorney, was also a deputy sheriff (fol. 174), and Mr. Thayer and Mr. Rice, both deputy district attorneys, proceeded, on April 27, 1944, to the office of Dr. Wolf for the purpose of placing him under arrest (fol. 126). As an incident to the arrest, the officers attempted to take any record "that might show the name of * * * Gertrude Martin" (fol. 138). It certainly does not appear that a "search" of the doctor's office was made, in any sense of the word. Mr. Thayer says that he saw Ex. "A" on a table in Dr. Wolf's office (fol. 145), and that he simply picked it up and brought it with him when he returned to the offices of the prosecuting attorney (fol. 146). Although we find no direct evidence pertaining to the acquisition by the people of People's Ex. "C" (the doctor's day book for 1943), Mr. Humphries indicates that "one other book", which, we presume was the day book for 1943, was taken at the same time People's Ex. "A" was acquired (fol. 136).

It is an admitted fact that the officers had no warrant for the arrest of Dr. Wolf and no search warrant authorizing them to search his office at the time hereinabove referred to. It is equally clear that the district attorney had strong and, we might say, conclusive evidence of the commission of a felony, i. e., procuring an unlawful abortion, by Dr. Wolf, and that the arrest was made upon such in-

formation. The two day books were taken incident to the arrest. It is also worthy of note that, so far as we can ascertain from the record, Dr. Wolf made no objection to the arrest, but, on the contrary, he apparently peaceably accompanied the officers to the office of the district attorney for questioning and investigation.

Having acquired these books, Mr. Humphries, as chief investigator, examined them and from such examination he became suspicious in several instances, particularly where the records disclosed rather large payments received by Dr. Wolf (fol. 209). In such case, representatives of the district attorney contacted the persons whose names appeared in the day book and questioned them concerning their activities (fol. 208). There is no intimation that any of the persons so contacted were forced to disclose any facts against their will. On the contrary, it appears that these patients frankly told of their relations with Dr. Wolf and whatever other doctor may have assisted in procuring an abortion in their particular case (fol. 210—see also fols. 218, et seq.).

These facts being shown out of the presence of the jury, the defendants next made an oral motion to quash the information on the ground that it was based upon evidence obtained by the district attorney in violation of the constitutional rights of the accused (fol. 243, et seq.) After considerable argument, the court finally denied this motion (fol. 267), first because the motion to quash was not made in writing, as required by the statutes (fol. 263), and, second, because counsel, having participated in the taking of the deposition of Miss Martin, were thereupon put upon notice, but nevertheless, failed to move to quash the information, and thereafter the defendants, with knowledge of these facts, entered their pleas of "not guilty" (fol. 266).

From the transcripts filed here, the court will note that the motion of petitioner, in the Wolf-Montgomery case, to return the defendant's books and records, asserts only that the alleged unlawful search and seizure constituted a violation of certain sections of the Constitution of Colorado, and no reference was made to an alleged violation of peti-

tioner's rights under the Constitution of the United States (Wolf-Montgomery Transcript, No. 593, p. 8).

In the Wolf-Fulton case, petitioner alleged, in his motion to suppress and return evidence, violation of certain portions of the Constitution of Colorado, and Amendments Four and Five of the Constitution of the United States (Wolf-Fulton Transcript, No. 594, p. 6), these two amendments having no application to state court proceedings, and in neither of said motions did he refer to the Fourteenth Amendment, or claim a violation of his rights thereunder.

We believe that we have sufficiently reviewed the facts pertinent to the issue presently before the court.

ARGUMENT.

Counsel for the petitioner state that "the sole question presented is whether the Fourth and Fourteenth Amendments of the Constitution of the United States protect a person from an unreasonable search and seizure by state officials" (p. 7, Brief of Petitioner). This, of course, assumes that the respondents concede that an unreasonable search and seizure occurred in the case at bar, a fact we most emphatically deny, and an issue not decided by the Supreme Court of Colorado.

The People of the State of Colorado are as greatly concerned with the preservation of freedom and liberty as are the people of any other state of this great union. The courts of Colorado jealously guard the rights and privileges of those persons accused of crime and brought to trial before the bar of justice. The Constitution of Colorado provides, in part.

> "The People shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures * * *." Sec. 7, Art. II, Constitution of Colorado.

It is a conceded fact that no warrant for the arrest of Dr. Wolf had been issued when the officers took him in custody on April 27, 1944.

It is likewise an undisputed fact that, at such time, the arresting officer, Louis Malach, a deputy sheriff, knew all of the facts related by Gertrude Martin from which it conclusively appeared that Drs. Wolf and Montgomery had cooperated to procure an abortion upon her. These facts, we submit, were ample to justify a reasonable belief that Wolf and Montgomery were guilty of the commission of a felony.

It therefore follows, as a matter of law, that, having reasonable grounds to believe that Dr. Wolf had committed a felony, the arresting officer had power, and was fully justified in making the arrest without warrant. In support of this position, we refer to but a few of the adjudicated cases, decided within the past two or three years. We quote from a case which we think the court will find most informative on the issue now under discussion and also on other points pertinent to this case.

> "Initially, there can be no doubt that defendant was lawfully arrested, *even though the agents possessed no warrant. The law is clear that any person, law enforcement officer or private citizen, can make an arrest where a felony has in fact been committed, and the person making the arrest has probable cause for so believing.*" (Italics supplied.)
>
> United States v. Lindenfeld, 142 Fed. (2d) 829, 831.

Continuing, the court said:

> "Conceding the lawfulness of the arrest, therefore, the crucial issue arises as to whether the agents could legally have sought and seized the cards as an incident thereto. The mass of seemingly conflicting decisions on the point, which can serve only as a general guide, since each case must be decided on its own facts, Go-Bart Importing Co. v. United States, supra, 282 U. S. at page 357, 51 S. Ct. at page 158, 75 L. Ed. 374, and through which, as we said in Matthews v. Correa, 2 Cir., 135 F. 2nd 534, 536, we must proceed 'gingerly' and 'with due circumspection, so far as lies in our power, for the constitutional rights of the petitioner and the need that government officials be not unduly hampered in tracking down crime,' have

evolved certain general principles. Surely when there is a lawful arrest, the premises may be searched; the cases are not in accord merely as to how broad an area the search can cover and as to what can be the objects of the search. The better view as to area is that the search can cover that part of the premises over which the offender's control and unlawful activities likely extended, Adams v. New York, 192 U. S. 585, 24 S. Ct. 372, 48 L. Ed. 575; Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915 C, 1177; Bouled v. United States, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647; Sayers v. United States, 9 Cir., 2 F. 2d 146, 147; United States v. Wilson, C. C. S. D. N. Y., 163 F. 338; or, as it was phrased in Marron v. United States, 275 U. S. 192, 199, 48 S. Ct. 74, 72 L. Ed. 231, the 'search can include "all parts of the premises used for the unlawful purpose.' A refinement of this doctrine is that the objects sought must be in the 'immediate possession and control' of the accused. Marron v. United States, supra, 275 U. S. at page 199, 48 S. Ct. at page 77, 72 L. Ed. 231; Go-Bart Importing Co. v. United States, supra; United States v. Lefkowitz, 285 U. S. 452, 52 S. Ct. 420, 76 L. Ed. 877, 82 A. L. R. 775. Within this area, there is agreement that fair game for the searchers consists of 'things used to carry on the criminal enterprise,' Marron v. United States, supra, 275 U. S. at page 199, 48 S. Ct. at page 77, 72 L. Ed. 231, or the fruits of the crime and the means by which it was committed." (Id., page 832).

In the case just cited, the items "seized" by the arresting officers were simple office cards upon which the defendant, a physician, kept his records. They were, as the court pointed out, "one of the cornerstones of the government's case", and from them "the government was able to secure several additional witnesses, beyond the informers, to testify against defendant." The court approved the seizure of the records as "an incident to a lawful arrest" and held there was no error in permitting the reception of the evidence so obtained. We respectfully submit that this case correctly states the rules of law applicable to the case at bar.

The case just cited was decided in 1944. We turn now to a yet later case where the items seized by the officers, arresting without warrant, and later admitted in evidence, were a sport shirt, a pair of trousers, a partly filled bottle of whiskey, and a newspaper. The court said:

> "Appellant properly conceded that an officer making a lawful arrest on a criminal charge may take such articles as may reasonably be used as evidence; * * *."
>
> Morton v. United States, 147 Fed. (2d) 28, 30.

Another case from the federal courts contains the following comment:

> "A police officer may arrest without warrant persons believed by the officer upon reasonable cause to have been guilty of a felony. * * * Contemporaneous with the arrest and as an incident thereto, they had the right to seize the things used in connection with the commission of the crime."
>
> United States v. Stein, 53 Fed. Supp. 911, 913.

In the case last cited, the defendant sought, by motion, to obtain an order "directing the return to the defendants of all memoranda, including slips, receipts and papers taken from the defendants by customs agents, secret service agents and city detectives and all other evidence which was taken from the persons of said defendants at the time of their arrest and for an order directing the United States Attorney to destroy all evidence which cannot be returned and for an order suppressing the use of the same upon the trial." (Id., page 911). The motion was "denied in all respects."

This rule, then, is so well established that the citation of cumulative authorities would serve no good purpose. We respectfully submit that it cannot be successfully denied that the officers, with reasonable cause to believe a felony had been committed by the defendant Wolf, had the right to arrest him, even though no warrant for arrest had been issued. Incident to such arrest, they had the further right to seize such material evidence as they found in the immediate vicinity of the place of arrest. Neither such arrest nor seizure we submit were in violation of the constitutional rights of the accused.

At the trial, the district attorney took the position that, even if there had been an unlawful seizure, the evidence was, nevertheless, admissible under the rule of law adopted in Colorado and announced in Massantonio v. People, 77 Colo. 392, 236 Pac. 1019. However that may be, we are thoroughly convinced that the rule need not be here invoked, for the very obvious reason that here there was no unlawful arrest or unreasonable search or seizure such as is prohibited either by the state or federal constitutions.

The defendants, as we read their briefs, rely primarily upon three cases. These authorities are:

United States v. Lefkowitz, 52 S. Ct. 420, 285 U. S. 452.
People v. Martin, 382 Ill. 192, 46 N. E. (2d) 997.
People v. Schmoll, 383 Ill. 280, 48 N. E. (2d) 933.

While other authorities are cited, these are the principal decisions which, it is contended, sustain the position of the defendants. Let us examine them more closely.

First, we direct our attention to United States v. Lefkowitz, supra. The Supreme Court of the United States there affirmed an order of the United States Circuit Court of Appeals, and it is to the report of the Circuit Court that we now turn for a more complete statement of the factual situation that existed in that case. It appears that the two petitioners were arrested by a deputy United States marshal in execution of a John Doe warrant. The arrests were treated as having been made lawfully. Continuing, the court said:

> "Contemporaneously with the arrests, both rooms were thoroughly searched. Two desks were opened, ransacked, and papers they contained seized; a towel cabinet was searched and papers in it seized; waste paper baskets were emptied and scraps of paper taken from them and later pasted together. All that was seized after this search was delivered to the United States attorney, who now has possession of so much thereof as he has not seen fit to return."
>
> Lefkowitz v. U. S. etc., 52 Fed. (2d) 52, 53.

In addition to the evidence so seized, the officers took certain items from the person of Lefkowitz himself. Said the court:

"Without confusing a search for and seizure of contraband of which the government is entitled to take possession because of what in law is said to be the inherent guilt of the res itself and the search for and seizure of books, papers, documents and the like which are not, at least as yet, considered guilty themselves, but are only wanted to prove the guilt of persons or property, it is needless to emphasize that searches and seizures of both kinds must always be reasonable to be lawful. Whenever evidence is searched for and seized, it must be in connection with something else which gives to the public a paramount interest in it. * * * Consequently, when a seizure of contraband is defended as an incident of a lawful arrest, as in United States v. 1013 Crates, etc., supra, or a seizure of evidence is defended on the same ground, as in this case, the reasonableness of the search which resulted in the seizure is the test of legality in each instance.

"The application of this principle to the present case results at once in dividing the property seized into two classes—that which was taken from the person of petitioner Lefkowitz when he was arrested and searched; and that which was seized when the office and its furniture were explored for evidence.

"The things that were found on Lefkowitz were lawfully seized and may be used against him. Agnello v. United States, 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145, 51 A. L. R. 409; Marron v. United States, 275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231; United States v. Kirschenblatt, (C. C. A.) 16 F. (2d) 202; 51 A. L. R. 416. The law on this subject has long been so well settled that it is useless to do more than state it whenever occasion arises. It is difficult to conceive how the facts in one case can make it differ from others in this respect, and such a search properly

conducted is reasonable as a matter of law." (Id., pages 52, 53, 54.)

The court then directed its attention to the evidence seized when the offices were *searched*, a procedure the court held to be unlawful, particularly noting, however, that

> "Such a search and seizure as these officers indulged themselves in is not like that in Marron v. United States, 275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231, where things openly displayed to view were picked up by the officers and taken away at the time an arrest was made." (Id., page 54.)

Applying these principles to the case at bar, there is nothing whatever in the instant record to indicate a search of any kind. It is our position, as previously stated, that the defendant was lawfully arrested without warrant by the officers who had reasonable grounds to believe him guilty of a felony. His offices were not searched. But the day books, lying on the table in open sight, were certainly so directly under his control that it was permissible for the officers, making a lawful arrest, to take them as an incident of the arrest.

The U. S. Supreme Court, commenting on its earlier decision in the Marron case, supra, said:

> "These searches and seizures are to be distinguished from the seizure of a ledger and some bills that was sustained in the Marron case. * * * The ledger and bills being in plain view were picked up by the officers as an incident of the arrest. No search for them was made. The ledger was held to be part of the outfit actually used to commit the offense."
>
> U. S. v. Lefkowitz, 52 S. Ct. 420, 423.

This case, then, not only fails to offer any solace to these defendants, but, on the contrary, it conclusively establishes the validity of the action of the arresting officer, and those assisting him, in picking up and retaining, as an incident of the arrest, the day books in plain view at the time of the arrest. This, we submit, was not an unreasonable search and seizure, nor, indeed, was it a search in any sense of the word.

In People v. Martin, 382 Ill. 192, 46 N. E. (2d) 997, the officers arrested the defendant Martin on February 7, 1941, and "in making the arrest the records and envelopes identified in evidence were *discovered* and turned over to the office of the States Attorney" (Id. 999). This, we submit, clearly indicates a search and seizure unlawful in itself, and obviously quite different from the action of the deputy district attorney in the case at bar, who, we again repeat, merely picked up a day book in plain view, without indulging in a *search* of any kind.

In People v. Schmoll, 383 Ill. 280, 48 N. E. (2d) 933, the defendant gave the officers permission to look at a particular record in his files. Thereafter, without his permission, and while the defendant was held in custody, having been previously arrested, the officers, without a search warrant, searched his offices and seized all of his records. This, we agree with the Illinois court, was unlawful and unconstitutional. The case, however, is no authority here because the facts of the case at bar are so essentially different from those in any of the cases cited by the defendant, that the instant case comes under the rule of law, universally recognized, permitting an arrest without warrant if the arresting officer has reasonable grounds to believe the accused guilty of a felony, and the seizure of items of evidence on his person or under his immediate control as an incident of the arrest. This case does not come under the rule of law announced by the cases cited in support of the contention of these defendants. This we submit as a fact to be determined by the court.

Likewise, as we have heretofore pointed out, it is not a mere seizure, or even a search and seizure of evidence that is prohibited by the state and federal constitutions. These venerable documents forbid only *unreasonable* searches and seizures.

> "Neither the Federal Constitution nor the State Constitution forbids a search and seizure without a warrant. Those instruments forbid unreasonable searches and seizures. The question is not whether the officer had a search warrant; it is whether the

search and seizure were unreasonable. United States v. McBride, D. C., 287 F. 214, 216."

Hubin v. State, (Md. 1942), 23 Atl. (2d) 706, 710.

Summing up our position at this point, then, we reiterate that the defendant Wolf was lawfully arrested without warrant because the officers had reasonable grounds to believe that he had committed a felony. This belief was based upon the fact of their actual knowledge of the physical condition of Gertrude Martin, the discovery of this young woman in the same hotel where the doctor maintained his residence, the same not being the residence of the girl, and her uncontradicted statement that the defendant had performed an abortion upon her. Armed with this knowledge, the officers made a lawful arrest, and a lawful seizure of evidence in plain sight at the time. There was no *search*, and certainly no *unreasonable* search and seizure such as is prohibited by the constitution.

If, however, for the sake of argument, we now concede that the evidence in question was illegally seized, still the defendant cannot be heard to complain. It is true that there is apparently an irreconcilable conflict among the decisions of the courts of last resort of the several states pertaining to the admission of evidence illegally obtained. Colorado, by the decisions of its highest court, is committed to the doctrine that the manner in which evidence is obtained, whether legal or illegal, does not affect its admissibility. This rule was established in the now famous case of Massantonio v. People, 77 Colo. 392, 236 Pac. 1019. The rule was affirmed in the later case of Roberts v. People, 78 Colo. 555, 243 Pac. 544. There, at page 559, the court said:

"'4. Since the supersedeas was granted in the instant case we have established, as the rule in this jurisdiction, that the admissibility of evidence is not affected by the fact that it has been unlawfully seized. Massantonio v. People, 77 Colo. 392, 236 Pac. 1019.'"

"That conclusion was reached after a thorough examination of all the available authorities and a

careful consideration of the alleged reasons supporting each. We reaffirm it. It is now urged, however, that one of the reasons there given must fail in this jurisdiction because section 3726, C. L. 1921, exempts an officer from liability for any unlawful act committed while engaged in good faith in the enforcement of the prohibition law. The validity of that act, when urged in defense of one who invades the sanctity of another's domicile in violation of the Constitution, must be determined when properly before us. It is not so here. If, under such circumstances, the act would be a complete defense, it must be because the legislature was empowered to adopt it, and if so its existence would affect in no way the rule laid down in the Massantonio case nor the reasons supporting it. There is ample authority, as therein set forth, for that decision, but it does not rest primarily upon authority, but upon reason. If the application of the rule were divorced from popular prejudice concerning the manufacture and sale of intoxicating liquor, and violations of law by corporations, proof of which depends upon records unlawfully seized, we think the unanimous verdict of lawyer and layman would support the rule of admissibility. Let it be announced, for instance, that one unquestionably guilty of an atrocious murder had been turned loose because it developed that the weapon with which the crime was committed and the blood soaked clothes of the victim, offered in evidence, and without which conviction could not be obtained, had been excluded because some rule of law had not been complied with in their seizure, and a shudder would run through the commonwealth, and its citizens, with one voice, would condemn the helplessness of its court against the depredations of outlaws.

"The argument that the rule announced in the Massantonio case leaves the citizens unprotected against one who unlawfully and violently enters his dwelling if the wrongdoer is unable to respond in damages, should be addressed to the legislature not

the courts, and apparently overlooks the fact that such an entry was a criminal trespass and indictable at common law (19 Cyc. 1113, 1117), and that the common law has been adopted in Colorado."

Colorado is not alone in thus interpreting the law. Following earlier decisions of the state appellate court, the Court of General Sessions of New York County in 1939 approved the rule that

> "The court will not take notice of how they (papers or other articles of personal property) were obtained—whether lawfully or unlawfully—nor will it frame issues to determine that question."
>
> People v. Kuhn, 15 N. Y. S. (2d) 1005, 1007.

In Maryland, although now governed by specific statutory provisions, the like of which we do not have in Colorado, the Court of Appeals announced the law, in a well worded decision, as follows:

> "Prior to the enactment of the Bouse Act in 1929, Maryland followed the ancient rule of the common law that evidence is not rendered inadmissible by the fact that it was procured by unlawful search and seizure. Meisinger v. State, 155 Md. 195, 141 A. 536, 142 A. 190. The Supreme Court of California explained the reason for the rule in the following language: 'From the necessities of the case the law countenances many devious methods of procuring evidence in criminal cases.' The whole system of espionage rests largely upon deceiving and trapping the wrongdoer into some involuntary disclosure of his crime. 'It dissimulates a way into his confidence; it listens at the keyhole and peers through the transomlight.' 'It is not nice, but it is necessary in ferreting out the crimes against society which are always done in darkness and concealment.' People v. Mayen, 188 Cal. 237, 205 P. 435, 440, 24 A. L. R. 1383. * * * Unquestionably it is within the established power of the State to prescribe the evidence which may be received in the courts of its own government."
>
> Hubin v. State, (Md.) 23 Atl. (2d) 706, 708.

In 1938, the Supreme Court of North Carolina said:

"Under the common law, with few exceptions, such as involuntary confessions, evidence otherwise competent is admissible irrespective of the manner in which it was obtained by the witness. The Courts look to the competency of the evidence, not to the manner in which it was acquired. This rule has long been followed in the Courts of North Carolina. State v. Graham, 74 N. C. 646, 21 Am. Rep. 493; State v. Mallett, 125 N. C. 718, 725, 34 S. E. 651 (affirmed by the United States Supreme Court on writ of error in Mallett v. North Carolina, 181 U. S. 589, 21 S. Ct. 730, 45 L. Ed. 1015); State v. Thompson, 161 N. C. 238, 76 S. E. 249; State v. Wallace, 162 N. C. 622, 623, 78 S. E. 1; Ann. Cas. 1915B, 423; State v. Neville, 175 N. C. 731, 95 S. E. 55; State v. Godette, 188 N. C. 497, 125 S. E. 24; State v. Hickey, 198 N. C. 45, 150 S. E. 615. The rule is stated in 1 Greenleaf Ev., sec. 254a, as follows: 'It may be mentioned in this place that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question.'"

State v. McGee, 214 N. C. 184, 198 S. E. 616, 617.

This decision was further approved by the same court in 1940 in the case of State v. Sherner, 216 N. C. 719, 6 S. E. (2d) 529, 530.

A well worded decision further recognizing the right of each state to fix the rules of evidence within its jurisdiction is as follows:

"* * * appellant insists that there must be removed from the evidence above discussed all testimony given by the two officers, for the reason that

they entered the apartment without a search warrant. Continuing his theory at this juncture, appellant complains that such actions on the part of these officers amounted to and were an infringement of his constitutional rights. More particularly, it is his claim that the trial court's reception of the evidence thus obtained violates the Fourth and Fourteenth Amendments to the United States Constitution, and sections 8 and 9, art. 1, of the Iowa Constitution. Further appellant urges that the federal prohibitory law does not permit the use of evidence obtained by a search and seizure without a valid search warrant, and cites Peru v. United States (C. C. A.) 4 F. (2d) 880.

"But the indictment in the case at bar is not based upon the laws of the United States. Said instrument was founded upon the state laws against trafficking in intoxicating liquors. So the state rule, as distinguished from the federal doctrine, must govern. Previously this court was required, at different times, to pass upon the question relating to the admissibility of evidence obtained in the manner and way here employed. Upon those occasions it was held that such evidence could be properly received. State v. Lambertti, 204 Iowa 670, 215 N. W. 752; State v. Gorman, 196 Iowa 237, 194 N. W. 225; Joyner v. Utterback, 196 Iowa 1040, 195 N. W. 594; State v. Rowley, 197 Iowa 977, 195 N. W. 881; Lucia v. Utterback, 197 Iowa 1181, 198 N. W. 628; State v. Parenti, 200 Iowa 333, 202 N. W. 77; State v. Wenks, 200 Iowa 669, 202 N. W. 753. Apt language in the Lambertti case is:

"'Prior to the time of the trial, the defendant filed a motion to suppress all of the evidence obtained by the search of the defendant's premises under the search warrant, on the ground that said search warrant was illegally issued, in that the same was in violation of section 8, article 1, of the Constitution of the state of Iowa, * * * and in violation of the Fourth Amendment to the Constitution of the United States, and in violation of the Fifth Amendment to the Con-

stitution of the United States. This motion was by the court overruled.

"'Objections were made to all of the foregoing evidence at the time of the trial, for the reasons urged in the "motion to suppress," and the objections were by the court overruled. These rulings by the court are assigned as error. In State v. Tomm, 195 Iowa 91 (191 N. W. 530), we held that evidence which is pertinent and relevant is admissible against the defendant in a prosecution for crime, even though the same was secured by an unlawful search of defendant's premises, and have universally so held in the subsequent cases. * * *'

"Reluctantly, there was no error permitting the introduction of such testimony."

State v. Bamsey, (Iowa) 223 N. W. 873, 874.

In a very recent decision by the Federal Circuit Court of Appeals (Tenth Circuit), the court said:

"When the officers got to his room, they took possession of two suitcases belonging to him. They opened them and examined their contents. These contents were offered and received in evidence over the objections of appellant. This evidence was of such a nature that it no doubt was considered by the jury and tended to influence its verdict. Admittedly the officers had no search warrant at the time they seized these suitcases and took possession of these exhibits.

"Even if we assume that the search was illegal, the evidence was nevertheless admissible. It is well settled that evidence obtained by State officers through an unreasonable or illegal search may nevertheless be used by the Federal government in a criminal case instituted in the Federal courts. Under this well settled principle, this evidence was clearly admissible."

Ruhl v. United States, (1945) 148 Fed. (2d) 173, 174.

We also call attention to the following pronouncement, made in 1944, quoting from an earlier California case:

"There is no rule better established or more universally recognized by the courts than that where competent evidence is produced on a trial the courts will not stop to inquire or investigate the source from whence it comes or the means by which it was obtained.'"

People v. Onofrio, (Cal.) 151 Pac. (2d) 158, 160. Continuing, the court said:

"This reason in the Mayen case found approval in the recent case of People v. Gonzales, 1942, 20 Cal. (2d) 165, 124 P. (2d) 44, 47, where it is cited with other cases and where the court also passed adversely upon the same contention that is made in the instant case, namely, that 'the prohibition in the Fourth Amendment of unreasonable searches and seizures is included in the provision of the Fourteenth Amendment that no state shall deprive any person of life, liberty, or property without due process of law, and therefore that under the interpretation given to the Fourth Amendment by the federal courts the introduction of evidence obtained by an illegal search and seizure constitutes a denial of due process of law.' The court points out that 'A criminal trial does not constitute a denial of due process of law so long as it is fair and impartial,' and 'The use of evidence obtained through an illegal search and seizure does not violate due process of law for it does not affect the fairness or impartiality of the trial. (Cases cited.) The fact that an officer acted improperly in obtaining evidence presented at the trial in no way precludes the court from rendering a fair and impartial judgment.' A writ of certiorari was denied by the Supreme Court of the United States in the Gonzales case, 317 U. S. 657, 63 S. Ct. 55, 87 L. Ed. 528." (Id. 160.)

The ruling was affirmed in People v. Peak, (Cal.) 153 Pac. (2d) 464, where at page 469 the court, recognizing "that various jurisdictions are not entirely in harmony with the above stated principles that redress for wrongful possession is not the exclusion of pertinent evidence", concludes that,

in that state, it is necessary to "turn to California decisions which must be accepted as the guide post directing the rule to follow."

So, in Colorado, the trial courts would indeed be subject to just criticism if they failed to look to the previous announcements of the Supreme Court of the state "as guide posts directing the rule to follow" in this jusrisdiction. That rule is unmistakingly set forth in Massantonio v. People, supra, and Roberts v. People, supra. So surely is this true that we deem it unnecessary to comment further on the point.

The situation, then, is plain that there does exist a so-called "federal rule" of evidence applicable in federal courts, which rule has been followed by some state courts. Other states, including Colorado, have followed the common law rule, as certainly we are bound to do until such time as the legislature of the state enacts an appropriate statute or statutes abrogating or modifying the common law.

Summing up our argument on this point, it is our sincere contention that there was no illegal search and seizure in the instant case, because the arrest, even though made without warrant, was nevertheless based upon a reasonable belief by the officers that the accused was guilty of a felony and was, therefore, lawful. No *search* of any kind was made, but evidence, in plain sight of the arresting officers, was taken and subsequently utilized. This was not an *unreasonable search and seizure* such as is prohibited by our organic law. Furthermore, if there was an illegal search and seizure of evidence, competent in itself, such evidence was admissible under the decisions of the Supreme Court of Colorado, and the trial judge was bound to follow the rules of law so announced for this jurisdiction. Such announcement was, and is, based upon an unquestioned interpretation of the common law, which, until modified by appropriate legislative action, remains the law in this jurisdiction.

CONCLUSION.

The first, and indeed the only question seriously argued by counsel, is that the evidence of the People was obtained in violation of the constitutional privileges of the defendants, and hence should have been suppressed. We have

demonstrated that their position is not well taken, and that the People did not obtain the evidence by illegal means. Even, however, if such had been the case, the evidence, otherwise competent, was admissible for the purpose of proving the commission of the crime, and this has, for long years, been the established law in Colorado. That a different rule may obtain in other states, offers no solace to these defendants who selected Colorado as the situs of their crime, and who therefore must abide by the rules of law announced by the Colorado Supreme Court for this jurisdiction.

We respectfully submit that the application for certiorari should be forthwith denied.

Respectfully submitted,

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Counsel for Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 17

JULIUS A. WOLF, *Petitioner*,

v.

THE PEOPLE OF THE STATE OF COLORADO.

No. 18

JULIUS A. WOLF, *Petitioner*,

v.

THE PEOPLE OF THE STATE OF COLORADO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF NEW YORK COUNTY CRIMINAL COURTS BAR ASSOCIATION AS *AMICUS CURIAE*

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Counsel for New York County Criminal Courts Bar Association.

EUGENE L. GAREY,
ABRAHAM HORNSTEIN,
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 17

JULIUS A. WOLF, *Petitioner*,

v.

THE PEOPLE OF THE STATE OF COLORADO.

No. 18

JULIUS A. WOLF, *Petitioner*,

v.

THE PEOPLE OF THE STATE OF COLORADO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

May it Please the Court:

1. The undersigned, as counsel for the New York County Criminal Courts Bar Association, respectfully moves this Honorable Court for leave to file the accompanying brief in these cases as *amicus curiae*.

2. The consent of the attorneys for petitioner and for respondent to the filing of this brief has been requested. Consent was given by petitioner. Respondent replied:

> "Mr. Hornbein states that his firm as counsel for the petitioner will execute the stipulation, but it is the desire of this office to examine the proposed brief before joining in same."

In view of the fact that the appeals herein were argued before this Court on October 19, 1948, application for leave

to file this brief as *amicus curiae* is being made to this Court instead of awaiting respondent's consent.

3. The New York County Criminal Courts Bar Association is one of the important bar associations of the nation, concerning itself—as a matter of the professional obligation of its members to the community—with the administration of the criminal law.

4. Petitioner was convicted, in each case, of a conspiracy to perform an abortion. The undersigned believes that such conviction was brought about by the admission in the trial court of evidence obtained as a result of unreasonable search and seizure, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

5. Petitioner filed before this Court his petition for a writ of certiorari, which petition was granted, and the two appeals herein were argued before this Court on October 19, 1948.

6. The New York County Criminal Courts Bar Association submits that the requirement of due process contained in the Fourteenth Amendment was violated by the admission in the trial court of the evidence in question.

7. The New York County Criminal Courts Bar Association, in accordance with what it deems to be the professional obligation of its members, desires to file a brief as *amicus curiae* in support of petitioner's writ of certiorari to the Supreme Court of the State of Colorado.

Wherefore it is respectfully requested that leave be granted to the New York County Criminal Courts Bar Association to file the accompanying brief in these cases as *amicus curiae*.

March 28, 1949.

Respectfully submitted,

EUGENE L. GAREY,
Counsel for New York County Criminal Courts Bar Association.

IN THE

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BRIEF OF NEW YORK COUNTY CRIMINAL COURTS BAR ASSOCIATION AS *AMICUS CURIAE*

Preliminary Statement

The undersigned adopts, as part of this brief, all statements contained at pages 1 to 7 of petitioner's brief under the captions "Opinions Below," "Jurisdiction," "Dates of Judgments," "Constitutional Question Involved," "Specification of Errors to be Relied on," and "Statement of the Case."

It is not the purpose of this brief to repeat any portion of the argument contained in petitioner's brief. This brief is intended only to supplement the argument therein.

POINT I

The due process requirement of the Fourteenth Amendment embraces a prohibition against unreasonable searches or seizures by State officers.

The undersigned find little to add to the argument contained in petitioner's brief on this point.

Only one additional argument might appropriately be made, stemming from the dissenting opinion of Roberts, *J.*, concurred in by Brandeis, Sutherland and Butler, *JJ.*, in *Snyder* v. *Massachusetts*, 291 U. S. 97, 78 L. ed. 674 (1934); the point discussed in this dissenting opinion was one on which the majority did not disagree with the dissenting Justices (see pp. 105-106).

Mr. Justice Roberts there stated (at pp. 129-131):

> "To allay the apprehensions of the people lest the federal government invade their liberties, the first ten amendments to the Constitution were adopted. The Sixth assures one accused of crime that if prosecuted under federal law he shall have a public trial, be informed of the nature and cause of the accusation, be confronted with the witnesses against him, and have the assistance of counsel for his defense.
>
> "But the purpose that all trials, in state as well as national tribunals, should not lack the same quality of fairness, is evidenced by the embodiment of a guarantee of similar import in the constitution of every state in the Union. [Footnote: In two States (California and Nevada) the constitutions omit reference to the right of the accused to confront the witnesses against him; but the omission is supplied by statute.]
>
> * * *
>
> "In the light of the universal acceptance of this fundamental rule of fairness that the prisoner may be present throughout his trial, it is not a matter of assumption but a certainty that the Fourteenth Amendment guarantees the observance of the rule."

From the foregoing quotation it will be noted that the four dissenting Justices (with whom the majority Justices did not disagree on this point; see pp. 105-106) were of opinion that where forty-six States had adopted constitutions similar in this respect to the constitutional mandate binding upon the Federal courts, the requirement there in question was to be deemed a fundamental rule of fairness, the observance of which was guaranteed by the Fourteenth Amendment.

A fortiori must that be deemed true with respect to the search and seizure requirement here at issue, in view of the fact that the constitution of each and every one of the forty-eight States prohibits unreasonable search and seizure.

See Constitutions of: Alabama: *I, 9(1819)*, I, 5(1901); Arizona: II, 8(1911); Arkansas: *II, 9(1836)*, II, 15(1874); California: *I, 19(1849)*, I, 19(1879); Colorado: II, 7(1876); Connecticut: I, 8(1818); Delaware: *I, 6(1792)*, I, 6(1897); Florida: *I, 7(1838)*, Decl. of Rights, 22(1885); Georgia: *I, 18(1865)*, I, I, XVI (1877); Idaho: I, 17 (1889); Illinois: *VIII, 7(1818)*, II, 6(1870); Indiana: *I, 8(1816)*, I, 11(1851); Iowa: *I, 8(1846)*, I, 8(1857); Kansas: *I, 14(1855)*, Bill of Rights, 15(1859); Kentucky: *XII, 9(1792)*, Bill of Rights, 10(1891); Louisiana: *VII, Art 108 (1864)*, I, 7(1921); Maine: I, 5(1819); Maryland: *Decl. of Rights, XXIII (1776)*, Decl. of Rights, 26 (1867); Massachusetts: I, Art. XIV (1780); Michigan: *I, 8(1835)*, II, 10(1908); Minnesota: I, 10(1857); Mississippi: *I, 9(1817)*, III, 23(1890); Missouri: *XIII, 13(1820)*, II, 11(1875); Montana: III, 7(1889); Nebraska: *I, 11(1866-1867)*, I, 7(1875); Nevada: I, 18(1864); New Hampshire: *I, XIX (1784)*, Bill of Rights, 19(1942); New Jersey: *I, 6(1844)*, I, 7(1947); New Mexico: II, 10(1911); New York: I, 12(1938); North Carolina: *Decl. of Rights, XI (1776)*, I, 15(1868); North Dakota: I, 18(1889); Ohio: *VIII, 5(1802)*, I, 14(1851); Oklahoma: II, 30(1907); Oregon: I, 9(1857); Pennsylvania: *Decl. of Rights, X (1776)*,

I, 8(1874); Rhode Island: I, 6(1842); South Carolina: I, 22(1868), I, 15(1895); South Dakota: VI, 11(1899); Tennessee: *XI, 7(1796)*, I, 7(1870); Texas: *I, 7(1845)*, I, 9(1876); Utah: I, 14(1895); Vermont: *I, XI (1777)*, I, 11(1793); Virginia: *Bill of Rights, 10(1776)*, I, 19(1902); Washington: I, 7 (1889); West Virginia: *II, 3(1861-63)*, III, 6(1872); Wisconsin: I, 11(1848); Wyoming: I, 4(1889). [The reference in italics is to the earliest Constitution in which such provision appears. Taken from article entitled "Concerning Searches and Seizures," by Osmond K. Fraenkel, 34 Harv. L. Rev. 361 (1921), which states that this information was taken from House Documents, 59th Congress, Vols. 87-91, Federal and State Constitutions (Thorpe), Government Printing office, 1909, (7 vols.). See also Federal and State Constitutions (Poore), Government Printing office, 1877 (2 vols.). Corrections down to date made by the undersigned.]

POINT II

This Court's power to require observance of the due process clause of the Fourteenth Amendment to the Constitution of the United States by the Courts of a State is not circumscribed by the consideration that this Court may, in so doing, override what the State Courts declare to be a rule of evidence.

It appears to be respondent's position that even though this Court may conclude that the Fourteenth Amendment to the Constitution of the United States bars unreasonable search and seizure by State officers, nevertheless this Court may not require that the use of evidence obtained as a result of such search and seizure shall be barred in a State court, since that would be to interfere with the application in a State court of a mere rule of evidence.

It has frequently been held by this Court that the declaration of a State Supreme Court that a statute lays down a mere rule of evidence does not bind this Court in its inquiry as to whether a petitioner's constitutional rights under the Fourteenth Amendment have been invaded. —

Truax v. *Corrigan*, 257 U. S. 312, 324, 66 L. ed. 254, 259 (1921);

Pollock v. *Williams*, 322 U. S. 4, 13, 88 L. ed. 1095, 1101 (1944);

Bailey v. *Alabama*, 219 U. S. 219, 55 L. ed. 191 (1914).

The principle that this Court may inquire into the correctness of a description of a rule of law—whether laid down by a State legislature or by a State Supreme Court, and whether laid down in a statute or as a matter of common law—as constituting merely a rule of evidence and not a rule of substantive law, has been applied by this Court in numerous instances.

Among the many types of cases in which this principle has been applied have been the cases of coerced confessions. See, for example:

Lisenba v. *California*, 314 U. S. 219, 86 L. ed. 166 (1941);

Ashcraft v. *Tennessee*, 322 U. S. 143, 88 L. ed. 1192 (1944);

Vernon v. *Alabama*, 313 U. S. 547, 85 L. ed. 1513 (1941);

Lomax v. *Texas*, 313 U. S. 544, 85 L. ed. 1511 (1941);

White v. *Texas*, 310 U. S. 530, 84 L. ed. 1342 (1940);

Canty v. *Alabama*, 309 U. S. 629, 84 L. ed. 988 (1940);

Chambers v. *Florida*, 309 U. S. 227, 84 L. ed. 716 (1940).

In the *Lisenba* case, *supra*, this Court, in an opinion by Roberts, J., declared (at pp. 236-237):

> "The Fourteenth Amendment leaves California free to adopt, by statute or decision, and to enforce, such

rule as she elects, whether it conform to that applied in the federal or in other state courts. But the adoption of the rule of her choice cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law.

"The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false. The criteria for decision of that question may differ from those appertaining to the State's rule as to the admissibility of a confession. * * *

"The concept of due process would void a trial in which by threats or promises in the presence of court and jury, a defendant was induced to testify against himself. The case can stand no better if, by resort to the same means, the defendant is induced to confess and his confession is given in evidence."

The close analogy between the issue in the *Lisenba* case and the issue here at bar is self-evident. "*The aim of the requirement of due process is* not to exclude presumptively false evidence, but *to prevent fundamental unfairness in the use of evidence, whether true or false*,"—and equally whether the evidence consists of a coerced confession or whether it consists of a document obtained as a result of unreasonable search or seizure.

The opinion of this Court by Roberts, *J.*, from which the foregoing has been quoted, was concurred in by all of the members of this Court except Black and Douglas, *JJ.*, who did not disagree with the enunciation of the foregoing principle, but who voted to reverse the conviction, presumably accepting as correct the statement in this Court's opinion, but disagreeing as to its application.

POINT III

If the Fourteenth Amendment be construed as prohibiting unreasonable searches and seizures by State officers, the use of evidence thus obtained should be barred because that is the only effective method of enforcing such prohibition. To point to the other theoretically available methods of enforcing such prohibition is to pay merely lip service to the constitutional requirement while actually vitiating it.

If it were the fact that the prohibition of unreasonable searches and seizures could be effectively enforced by any means other than the barring from use or admission into evidence of documents unreasonably searched for or seized, then there might be merit to respondent's contention that this Court should not interfere with the application in a State court of a rule of evidence.

Unfortunately, however, the actual situation here is that what is described by respondent as a mere rule of evidence is actually the sole effective means of enforcing the substantive rule of law.

Other theoretical remedies for violation of the prohibition of unreasonable searches and seizures are pointed to. Experience has adequately demonstrated, however, that such remedies are remedies in name only. In reality, no remedy for the enforcement of the constitutional requirement is available except the exclusion of the evidence unreasonably searched for or seized.

A painstaking study and analysis of this question was made in an article entitled "Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures," written by Thomas E. Atkinson, and appearing in 25 Col. L. Rev. 11 (1925).

The undersigned feel that nothing which they could say on this point would be as helpful to this Court as a reproduction of some pages of that article, and in lieu of further

gument on this point by the undersigned, pages 21-24 that article are here reproduced:

"'The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures *shall not be violated*.' This mandatory language refers principally to executive and judicial violations. To be at all sensible, a construction must be given which will effectively curtail such acts.

"Means of curtailment may be direct or indirect—or more properly speaking—more or less direct. Thus it might be imagined that an armed guard could be placed in front of every dwelling to see that no officer should make an unreasonable search. This means of enforcing the Fourth Amendment, if practical, would be quite direct.

"Another means of enforcement is self-help, *viz.*, resistance to the attempt to make the unreasonable search. In many, if not in most cases, this remedy fails because the search is conducted in the person's absence. But if the person be present, he may no doubt use sufficient force to prevent the unreasonable search and, possibly, may kill the officer if necessary.

"This method of insisting upon one's rights is barbaric; it is attended with turmoil and perhaps more serious consequences; it is thoroughly inadequate, for the person is required to decide instantly and unaided the difficult question of whether the search is reasonable. If he erroneously decides that the search is unreasonable, he lays himself open to serious consequences in resisting.

"There are two additional means of enforcing the Fourth Amendment which are fairly direct, *viz.*, by civil suit against the offending officer and by criminal action against him. However it may have been formerly, it is every day observation that neither is adequate at present.

"Generally an innocent person whose rights have been invaded will not seek civil relief unless there is substantial physical or property injury. Courts and juries are not in the habit of giving substantial damages where there has been a mere violation of privacy without visible loss. Few innocent persons will lay out time and money in order to recover nominal damages for

the violation of a right, no matter how fundamental and precious that right may be. Yet the soul will be rankled and the people dissatisfied.

"A guilty person is in even a worse position. He could not even *hope* to recover more than nominal damages unless the search was attended by serious personal injury or destruction of lawful property. Of course he could not recover the amount of the fine or the value of his time during imprisonment.

"The other alternative, a criminal action against the offending officer, seems inadequate. If mere technical violations of the Fourth Amendment are punished criminally, this would discourage an officer from doing his duty whenever there could be any doubt as to the legality of the search. On the other hand, if punishment be confined to malicious violations of the Fourth Amendment or cases in which substantial physical damages were done, the result would be that the force of the Fourth Amendment would be gradually whittled away.

"In addition, prosecutors are naturally loathe to proceed against the officers who have furnished them the convicting evidence. An example of this is shown by recent experience. An amendment to the National Prohibition Law provides for criminal punishment of officers who make illegal searches. About three years have elapsed and there is no reported case in which an officer has been punished under its provisions. Cases are numerous in which unreasonable searches were made. The absence of cases punishing officers criminally or giving compensation to persons whose rights are violated shows that these means are not adequate to preserve the Fourth Amendment as part of our living law.

"If it be said that this is a confession of weakness in our law and legal system, it cannot be helped. There is a natural limitation on all law; that it should fairly comply with the ideas of the people as a whole. No rule or system can change conditions which are deeply imbedded in the hearts of men.

"What law can compel or induce innocent persons to sue offending officers? What prosecutor will go out of his way to find grounds for a criminal charge against the officers, whose delictual diligence has raised the prosecutor's batting average? And, as has been

humorously remarked, what United States marshal is going to be confined on prison fare?

"The exclusion of evidence procured by violating the Fourth Amendment is possibly still less direct than any of the methods suggested above. Though indirect, it is none the less real enforcement. Something is necessary to curtail violations which interfere only with the convenience and feelings of the people. The more violent and obvious infringements may be curtailed through civil or criminal actions against the guilty officers.

"If the officers know that the evidence which they obtain through violations of the Amendment cannot be used, they will have no incentive to indulge in even merely technical violations. With nothing to gain by the unreasonable search, and with the possibility of a civil suit or criminal charge, the tendency of the officers will be to refrain from violations of the provisions of the Constitution. Analogous situations, in which the law resorts to similar indirect means of enforcing a rule, can easily be found."

The documentation of the foregoing article in footnotes is not here reproduced. It contains much instructive material and justification for the learned author's conclusion, from his study, that the only genuine means of enforcement of the prohibition of unreasonable searches and seizures is the barring from evidence of material thus obtained, and that the other so-called remedies are such only in name.

In its opinion in one of the very cases at bar, the Supreme Court of the State of Colorado has revealed its own realization that the unreasonable search and seizure prohibition cannot be effectively enforced except by barring the evidence unreasonably searched for or seized.

In Case No. 17, the Supreme Court of Colorado, in its opinion reported at 117 Colo. 279, 283, 187 P. 2d 926, 928 (1947), states:

"If a case ever comes before us which demonstrates that the rule in the Massantonio case [admitting evidence unreasonably searched for and seized] has

> worked injustice, or prevented justice, it will be time enough to consider alteration or modification of that rule."

In other words, if a case subsequently arises in which the Supreme Court of the State of Colorado thinks that an innocent man has been convicted as a result of admission of evidence unreasonably searched for or seized, then it may hold that such evidence should have been barred; but where it thinks that the convicted man was guilty, it will continue to hold such evidence admissible.

This is not enforcement of the constitutional search and seizure requirement. It discriminates between the innocent and the guilty: if a man is innocent, then his home may not be searched without a warrant; if he is guilty, then it may be.

The most disturbing feature of this pronouncement by the Supreme Court of the State of Colorado is that its contemplated enforcement of the search and seizure requirement by the barring of evidence will be only in those cases where enforcement by that method is least needed.

An innocent man, whose unjustified conviction has been reversed by the State Supreme Court, would doubtless stand a much better chance of profiting by the other theoretical remedies than would a guilty man whose conviction has been sustained by the State Supreme Court. Thus, the innocent man might far more reasonably hope to secure civil damages in a suit against the State officers who had conducted the illegal search and seizure than would a convict issuing his civil process from his cell in state's prison.

And yet, it is only to the citizen who might conceivably have other remedies available to him that the State Supreme Court is contemplating the possible extension in the future of the further remedy of barring admission into evidence against him of material illegally searched for or seized. To the person who patently has no other remedy

than the barring of such evidence, the State Supreme Court is determined not to extend the remedy of barring the evidence.

This is not merely discriminatory enforcement of the constitutional requirement. It is unsound discriminatory enforcement of such requirement.

CONCLUSION

The judgments of the Supreme Court of the State of Colorado in the cases at bar should be reversed.

Respectfully submitted,

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